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Judging Immigration Equity: Deportation and Proportionality in the Supreme Court

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Though it has not directly said so, the United States Supreme Court cares about proportionality in the deportation system. Or at least it thinks someone in the system should be considering the justifiability of removal decisions. As this Article demonstrates, the Court's jurisprudence across a range of substantive and procedural challenges over the last fifteen years increases or preserves structural opportunities for equitable balancing at multiple levels in the deportation process. Notably, the Court has endorsed decision makers' consideration of the normative justifiability of deportation even where noncitizens have a criminal history or lack a formal path to lawful status. This proportionality-based lens helps unify the Court's seemingly disparate decisions regulating the immigration enforcement system in recent years. It also has implications for deferred action enforcement programs such as the DACA program implemented by President Obama in 2012. The Court's general gravitation toward proportionality analysis in this field is sound. Nevertheless, there are drawbacks to the Court's approach, and the cases are probably best seen as signals to the political branches that the deportation system remains in dire need of wide-ranging reform.

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> "It's because you give [the deportation statute] such a broad construction that you get the . . . unusual situation . . . that the State thinks it's a very minor offense and yet it can become so significant that the person's deported."
>
> — Chief Justice John Roberts[1]

> "Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . . Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."
>
> — Justice Anthony Kennedy[2]

INTRODUCTION

On June 23, 2016, a deadlocked Supreme Court failed to reach a decision in *United States v. Texas*, which presented a challenge brought by twenty-six states to enjoin Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), an Obama administration program intended to extend discretionary deferral of removal to millions of undocumented residents in the United States.[3] The Court's unsigned one-line opinion is without precedential effect but had the consequence of affirming the lower court judgment, which preliminarily enjoined the Obama initiative. The Court then denied the administration's motion for rehearing before a full Supreme Court, returning the case to the district court for full consideration on the merits of the injunction.[4] After the November 2016 election of Donald Trump, Department of Justice officials, together with lawyers for the twenty-six states, submitted a joint motion asking the district judge to

[1] Transcript of Oral Argument at 50, Mellouli v. Holder, 135 S. Ct. 1980 (2015) (No. 13-1034), 2015 WL 2399380.

[2] Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).

[3] *See* United States v. Texas, 136 S. Ct. 2271 (2016); *see also* United States v. Texas, 809 F.3d 134, 146 (5th Cir. 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (U.S. Jan. 19, 2016); RANDY CAPPS ET AL., MIGRATION POLICY INST., DEFERRED ACTION FOR UNAUTHORIZED IMMIGRANT PARENTS: ANALYSIS OF DAPA'S POTENTIAL EFFECTS ON FAMILIES AND CHILDREN 1 (2016), http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families (estimating that 3.3 million undocumented noncitizens might have benefited from DAPA, impacting 4.3 million children and 2.3 million other adults residing in the noncitizens' households).

[4] Petition for Rehearing, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674), 2016 WL 3902439, *reh'g denied*, 2016 WL 5640497 (Oct. 3, 2016).

stay the litigation until after the new administration determines how it wishes to proceed.[5] It is anticipated that President-elect Trump will not pursue DAPA, and will also discontinue Deferred Action for Childhood Arrivals (DACA), a similar executive policy implemented in 2012. As of this writing, however, related litigation continues to percolate in other Circuits.[6]

Whether or not the *Texas* litigation continues, the initiatives at issue in that case raise fundamental questions about the scope of the executive branch's discretionary authority to decline to enforce removal provisions against certain noncitizens whose mitigating equities have been determined to outweigh the gravity of their immigration offenses.[7] Is it permissible (or desirable) for immigration officials to consider factors such as family connections, length of residence, and contributions to this country when making enforcement or removal decisions, even where code law provides the noncitizen no formal avenue for relief? Is it permissible (or desirable) for executive policy-makers to establish standards that mandate the exercise of equitable discretion, including when millions of deportable noncitizens might be able to satisfy them? Should the immigration status of the subject of potential enforcement be evaluated in

[5] *See* Josh Gerstein, *Citing Trump Win, Feds Move to Put Immigration Suit on Ice*, POLITICO (Nov. 18, 2016).

[6] *See, e.g.*, Complaint, Vidal v. Baran, No. 1:16-cv-04756 (E.D.N.Y. Aug. 25, 2016) (challenging nationwide scope of Judge Hanen's preliminary injunction in the DACA/DAPA litigation); Complaint, Lopez v. Richardson, No. 1:16-cv-09670 (N.D. Ill. Oct. 12, 2016) (same).

[7] To be sure, even if *Texas* or related litigation eventually reaches the Court again, the Justices might never reach the substantive questions at the heart of the case. The case raises thorny standing and procedural issues that offer courts a number of exit points. *See, e.g.*, Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind Pres. Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 693-94 (2016) (discussing whether the deferred action programs constitute binding rules requiring use of the Administrative Procedures Act's notice and comment provisions); Anne Egeler, *Symposium: Unable to Show Harm, Can Texas Employ the Court as a Political Referee?*, SCOTUSBLOG (Feb. 8, 2016), http://www.scotusblog.com/2016/02/symposium-unable-to-show-harm-can-texas-employ-the-court-as-a-political-referee/ (discussing standing issues in the case); Marty Lederman, *Two More Reasons Why the "Take Care" Argument in the DAPA Case Is a Non-Issue*, BALKANIZATION (Jan. 20, 2016, 1:47 PM), https://balkin.blogspot.com/2016/01/two-more-reasons-why-take-care-argument.html (explaining why the Court was unlikely to reach the constitutional question in the case no matter which side prevails); Leticia Saucedo, *On-Line Symposium on* Texas v. United States: *Employment Authorization, the DAPA Memo and the Fifth Circuit's Opinion*, IMMIGRATIONPROF BLOG (Nov. 15, 2015), http://lawprofessors.typepad.com/immigration/2015/11/in-line-symposium-on-texas-v-united-states-employment-authorization-the-dapa-memo-and-the-fifth-circ.html (discussing the intersection between DAPA and preexisting regulations permitting grants of employment authorization to persons with deferred action).

discretionary decisions? These are complex concerns about the salience and scope of equity and proportionality in the context of the modern day deportation system. Such concerns are of vital importance to policy-makers, jurists, and advocates as the nation continues to grapple with contentious immigration issues.

Texas was by no means the only case to reach the Court in recent years implicating the proportionality of the deportation system. Indeed, this Article aims to show that the Court has become increasingly troubled by the harsh and inflexible deportation rules enacted by Congress in the 1990s. Across a range of procedural and substantive law, the Court has issued decisions that endeavor to structure the exercise of deportation discretion in both criminal and administrative courts, in ways that encourage the possibility of equitable balancing and that constrain some of the most onerous applications of criminal removal provisions. What appears to underlie this jurisprudence, though never explicitly acknowledged by the Court, is a proportionality norm. The Court has not purported to engage in substantive proportionality review, and its decisions do not expressly make use of the term proportionality.[8] But its procedural and structural rulings in this area unmistakably promote consideration of noncitizens' mitigating characteristics before the life-altering sanction of deportation is imposed. This Article looks at the Court's deportation rulings holistically, drawing attention to the common themes in this emerging proportionality-influenced jurisprudence as well as the limitations of the Court's approach.

Part I of the Article offers a brief overview of changes made to the immigration code in the 1990s, thus providing necessary context for recent executive actions and Court decisions in this area. Part II turns to those decisions. First, Part II.A explains how in *Arizona v. United States*[9] the Court came to grips with the critical role that prosecutorial discretion plays in setting deportation policy. As the Court acknowledged, enforcement choices, rather than adjudicative decisions by immigration judges, are now the primary locus of decisions about priorities and fairness in the administration of deportation rules.[10] Significantly, the Court tied much of its analysis in

[8] However, while the Court's decisions primarily concern procedural rulings, several have a substantive effect, curbing the harshest applications of criminal removal statutes. *See infra* Parts II.B, III.B.

[9] 132 S. Ct. 2492, 2499 (2012).

[10] *See also* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (acknowledging that prosecutorial discretion in criminal courts critically influences immigration court outcomes).

Arizona to a perceived need to protect executive decisions *not* to enforce immigration law against certain removable noncitizens from state interference. Viewing *Arizona* through the lens of proportionality helps to reconcile the Court's separate preemption rulings in that case, and it does so in a way that may have an advantage over the Equal-Protection-based rationale put forward by other commentators.[11]

The remainder of Part II demonstrates that, while *Arizona* consolidated discretionary enforcement power in the federal government, another large body of the Court's recent immigration decisions has limited and shaped executive authority in ways that promote the possibility that a noncitizen's equities and infractions will be weighed before deportation is imposed. Part II.B explains how one set of decisions (most notably, *Padilla v. Kentucky*) increases opportunities for criminal court outcomes that account for the justifiability of deportation in individual cases, while the Court's categorical approach rulings operate to preserve criminal court deals that benefit noncitizens in subsequent removal proceedings. Part II.C discusses *Judulang v. Holder*,[12] a case that, while unusual, may presage further judicial scrutiny of prosecutorial charging practices in immigration court, at least to the extent that those decisions arbitrarily foreclose discretionary relief from removal. Part II.D turns to yet another group of decisions recognizing procedural rights to reopen deportation proceedings and to seek judicial review. Since 2008, the Court has taken numerous cases in which noncitizens sought to reopen a removal order to present a claimed right to remain. While these decisions do not directly consider proportionality qua proportionality — *i.e.*, the ratio between the sanction of deportation and the nature of the offense — they raise equity concerns more generally, implicating access to statute-based forms of relief and the quality of immigrant representation in removal proceedings.

Rounding out the survey, Part II.E discusses the Court's recent decisions concerning immigration detention, including a pending blockbuster case that the Court will decide this term, *Jennings v. Rodriguez*.[13] Because the Court's jurisprudence in this area has been mixed, the state of the law regarding executive authority to detain

[11] *See, e.g.*, HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW (2014); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012) [hereinafter *Immigration Federalism*]; Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL'Y 1 (2013).

[12] 132 S. Ct. 476 (2011).

[13] 136 S. Ct. 2489 (2016) (granting petition for certiorari).

during removal proceedings has been in flux since 2001. But noncitizens facing prolonged detention are already in a stronger position than in previous decades, and, if the Court upholds the Ninth Circuit's decision in *Rodriguez*,[14] many more noncitizens will have the opportunity to secure release during immigration proceedings, thereby enabling opportunities to present stronger legal and equitable defenses to deportation.

Part III turns to the implications, as well as the limitations, of the Court's newfound proportionality-based scrutiny in this area. Part III.A draws attention to the significant fact that the Court has emerged as the sole federal branch concerned with the value of individual evaluation of the justifiability of deportation in cases involving noncitizens with criminal history. The Court also has recognized the possibility that removals can be disproportionate for undocumented noncitizens who have no apparent means of adjusting their status under the Immigration and Nationality Act ("INA") — a point that suggests that executive branch officials could eventually prevail if large-scale non-enforcement initiatives return to the Court. Together, the Court's deportation decisions create or reinforce structural rules supporting the possibility of equitable balancing for both criminal offenders and the undocumented, in multiple stages of the removal process. Recognizing the proportionality norm that drives all of this jurisprudence helps to explain and reconcile the modern Court's deportation-related rulings in a wide variety of contexts.[15]

Part III.B considers the implications of this analysis for deferred action programs such as those initiated by President Obama. While the DACA and DAPA programs reflected the administration's proportionality concerns about particularly unjust applications of the immigration code, their size and largely categorical nature gave rise to controversy and legal uncertainty. Although ultimately side-stepping the issue of their constitutionality, this Part argues that the programs aligned with the equity-driven thrust of the Court's recent jurisprudence, and in particular, *Arizona*. Significantly, the vast majority of noncitizens protected from state action by the Court's

[14] Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom.* Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

[15] *Cf.* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. (forthcoming 2017) (manuscript at 25) (on file with the author) ("Missing from the literature, however, is an organizing meta-theory for how to sort exceptional and mainstream doctrines within and across constitutional dimensions, and to explain why immigration should be exceptional for some purposes but not for others.").

preemption findings in that case will have escaped federal enforcement as a consequence of macro-level enforcement and resource-allocation choices, rather than any case-by-case equitable balancing in individual cases. As such, *Arizona* helps lay some precedent for judicial validation of future administrative efforts to implement proportionality-driven non-enforcement efforts on a large scale.

Finally, Part III.C turns to the limitations of the Court's efforts thus far to ensure that the immigration system operates in a consistently just manner. Of particular importance, nearly all of these cases have been decided — unsurprisingly — on subconstitutional grounds.[16] Nor is the Court likely to endorse a constitutionally grounded substantive proportionality right in the removal context anytime soon.[17] As a result, a future administration could enforce immigration laws with less regard for proportionality, and Congress could create an even harsher and more rigid system. The Court's decisions in this area are perhaps best seen as signals — to lower courts, but especially to the political branches — that specific aspects of the deportation system are in dire need of reevaluation and reform.

I. HARSH LAW AND EQUITABLE DELEGATION

Towards the end of the twentieth century, Congress set into motion a radical transformation of immigration law in the United States. Extensive statutory changes to the immigration code made all unauthorized presence a deportable offense while vastly increasing the number of noncitizens — including lawful permanent residents ("LPRs") — subject to deportation and barred from lawful return on the basis of criminal history.[18] At the same time, criminal sentencing

[16] *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 579 (1990) [hereinafter *Phantom Constitutional Norms*] (discussing the difference between rulings decided on phantom, or subconstitutional, issues versus rulings decided on constitutional issues). Although the primary mode of judicial reasoning in this area involves statutory interpretation, the Court in fact decided several path-breaking decisions on constitutional grounds in recent years. *See infra* Parts II.A and II.B (discussing *Arizona* and *Padilla*).

[17] *See* Josh Bowers, *Plea-Bargaining's Baselines*, 57 WM. & MARY L. REV. 1083, 1090 (2016) [hereinafter *Baselines*] ("For the Court, inquiries into proportionality and purpose are just too murky — too subjective and indeterminate . . . ."); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015) ("The United States is often viewed as an outlier in this transnational embrace of proportionality in constitutional law.").

[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty

judges and administrative immigration judges, formerly empowered to balance the severity of deportation against the gravity of the underlying offense and the noncitizen's particular claim for leniency, saw their equitable discretion eviscerated.[19] As a result, petty shoplifting, turnstile-jumping, minor marijuana offenses, and many more minor crimes barely punishable under criminal laws now often result in automatic (or nearly automatic) removal, together with lengthy or permanent prohibition on lawful return.[20]

Amendments to the INA put in place at this time also greatly expanded the use of immigration detention. Some of these provisions permit authorities to seek the detention of anyone facing removal.[21] Others mandate confinement, for example on the basis of criminal history, including convictions for marijuana possession, petty theft, or other minor offenses that in many cases have little or no relation to the underlying assessment of risk that detention is intended to guard against.[22] The executive branch has vastly increased the number of noncitizens it detains in the twenty years since Congress enacted these detention rules. In 1996, about 6,600 persons were held in detention on any given day.[23] Now, that number has increased to over 34,000 immigration detainees per day, with over 400,000 detained each year in 250 separate prisons and secure facilities.[24]

In short, the modern deportation system subjects many millions of long-term noncitizens to detention and removal, with little

Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40 & 42 U.S.C.); *see* Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 671-76 (2015) [hereinafter *Enforcing Immigration Equity*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510-19 (2009) [hereinafter *President and Immigration*].

[19] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 676-78.

[20] *Id.* at 673-75; *see* Padilla v. Kentucky, 559 U.S. 356, 361 (2010) (describing how changes to the immigration code made deportation an almost automatic consequence of many criminal offenses).

[21] *See, e.g.*, Immigration and Nationality Act (INA), 8 U.S.C § 1225(a), (b)(2)(A) (2012) (requiring detention of noncitizens seeking admission who are "not clearly and beyond a doubt entitled to be admitted"); *id.* § 1231(a)(2), (a)(6) (requiring detention for up to 90 days following a removal order and authorizing continued detention beyond that period on a discretionary basis).

[22] *See id.* § 1226(c) (providing that immigration officials "shall take into custody any alien who [is inadmissible or deportable on most criminal grounds] . . . when the alien is released").

[23] *INS: Deportations, Detention*, MIGRATION NEWS (June 1998) http://migration.ucdavis.edu/mn/more.php?id=1547.

[24] *See* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 365 (2014).

opportunity for formal consideration of whether these severe sanctions are justified in individual cases. And yet, the legislative constriction of immigration judges' authority to set aside removal has not removed all consideration of fairness from the deportation system. As with squeezing a balloon, the contraction of judicial authority to wield equitable discretion has expanded the role of police and prosecutorial discretion in evaluating and extending relief to noncitizens based on their individual circumstances. This phenomenon is well understood in criminal law, where prosecutors' commitment to the just application of the law has long been accepted as necessary to mitigate the effect of overly broad, overly punitive, and inflexible penal statutes.[25] It seems that lawmakers increasingly rely on prosecutorial discretion to ensure that criminal law is appropriately applied to individual human beings.[26]

Likewise, in the immigration context, Congress's expansion of the grounds for removal coupled with its narrowing of adjudicative authority to grant discretionary relief effectively, if not intentionally, transferred substantial policy-making authority to enforcement officials.[27] To be sure, Congress has expressly delegated vast swaths of authority to the executive branch to establish domestic immigration enforcement priorities and to manage the admission of foreign nationals fleeing persecution, upheaval, natural disasters, or other humanitarian situations.[28] But the space for executive policy-making

[25] *See*, *e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1657 (2010) [hereinafter *Legal Guilt*]; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) [hereinafter *The Arc of the Pendulum*]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570-71 (2001).

[26] *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 154-57 (2007); Wayne LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533 (1970); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1963 (1992) (arguing that legislators intend that prosecutors will "exercise their discretion not to pursue habitual criminal sentencing for offenders who [fall] within the statute but seemed not to deserve such harsh treatment").

[27] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 679-81; Cox & Rodríguez, *President and Immigration*, *supra* note 18, at 464; Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 553-54 (2013); Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Divide*, 58 UCLA L. REV. 1819, 1820-21 (2011) [hereinafter *The Discretion that Matters*].

[28] *See* 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities"); 8 U.S.C. § 1103(a) (2012) (conferring broad power to the Secretary of Homeland Security over

power in this area also stems from "a profound mismatch between the law on the books and the reality on the ground," an incongruity resulting from "a series of legal, political, and demographic developments that have accelerated over the last four decades."[29] These developments include not only the INA's blunderbuss removal provisions, but also the longstanding acquiescence by both political branches in the unauthorized migration and employment of noncitizens.[30]

I have argued in previous work that Congress's explicit and de facto delegations of authority to the executive branch obligate immigration officials to ensure that immigration laws are not enforced in an arbitrary, discriminatory, or disproportionate manner.[31] In *Enforcing*

"the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens"); *id.* § 1254a(b)(1) (delegating the Attorney General authority to designate countries in which natural disasters, war, or other significant upheaval warrant granting "temporary protected status" to nationals of those countries residing in the United States); *id.* § 1182(d)(5)(A) (delegating authority to the Attorney General to "parole" inadmissible noncitizens into the country for "urgent humanitarian reasons or significant public benefit"); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102-03 (1980) (codified as amended in scattered sections of 8 U.S.C.) (giving the President authority to determine the countries from which refugees would be admitted and the total number of refugee admissions each year).

[29] Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 131 (2015) [hereinafter *Redux*]; *see also* MOTOMURA, *supra* note 11, at 19-55 (explaining the political and historical factors that contributed to the size of the current unauthorized population and the connection with enforcement discretion).

[30] *See* MOTOMURA, *supra* note 11, at 19-55; Cox & Rodriguez, *Redux*, *supra* note 29, at 147-49.

[31] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 661 (offering a critical assessment of the Obama administration's efforts to administer deportation equitably); Jason A. Cade, *Policing the Immigration Police*, 113 COLUM. L. REV. SIDEBAR 180, 187-98 (2013) [hereinafter *Policing the Immigration Police*] (arguing that the Executive bears responsibility for ensuring that the Fourth Amendment is fully upheld in the administration of immigration law whether or not judicially enforceable remedies for constitutional violations are available); Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 25, 39 (2015), http://www.nyulawreview.org/online-features/return-jrad [hereinafter *Return of the JRAD*] (arguing that immigration officials should rely on pardons, expungements, and sentencing judges' recommendations against deportation as "disproportionality rules of thumb" when determining whether to pursue removal against noncitizens with criminal history); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 1-2 (2014) [hereinafter *The Challenge of Seeing Justice Done*] (suggesting a range of administrative reforms to make deportation hearings more accurate and fair); Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1812-13 (2013) [hereinafter *Plea Bargain Crisis*] (arguing that the Executive should scale back

Immigration Equity, for example, I described the primary ways in which the Department of Homeland Security implemented its discretionary enforcement powers in immigration law under the Obama administration.[32] These measures include (1) focusing finite resources on the apprehension and removal of recent border-crossers and noncitizens who encounter criminal justice systems, (2) pushing for increased use of prosecutorial discretion in individual deportation cases, and (3) creating programs to administer discretion on a more consistent basis for certain noncitizens.[33]

While these actions reflect serious (if not extraordinary) efforts to administer deportation rules fairly, significant challenges hamper a system that relies so heavily on enforcement discretion to remain normatively justifiable.[34] Central among these obstacles are (1) an entrenched enforcement culture that treats almost any criminal history as an irrefutable proxy for undesirability, (2) crushing workloads for front-line operatives, who otherwise might be open to investigating the mitigating details of individual deportation cases, and (3) political pushback against the exercise of prosecutorial leniency.[35] *Enforcing Immigration Equity* proposed a range of legislative and administrative reforms that might improve the existing system. Most importantly, Congress could roll back the breadth of removal provisions and restore a larger measure of equitable discretion to sentencing judges and immigration judges.[36] Additionally, it could enact limitations periods prohibiting the use of very old convictions as the basis for deportation.[37] Congress could also strengthen certain procedural protections that improve the accuracy and fairness of removal-proceeding outcomes.[38] And the Executive could undertake many similar, if distinctly second-best, administrative reforms.[39]

Whether through legislative or administrative measures, *Enforcing Immigration Equity* argued, "severe penalties imposed on the basis of

immigration enforcement measures targeting noncitizens facing only misdemeanor charges in light of (1) such convictions' general unreliability as evidence of wrong-doing and (2) corrosive feedback loops created by the federal immigration agency's integration with the misdemeanor system).

[32] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 687-98.

[33] *Id.*

[34] *Id.* at 698-713.

[35] *Id.* at 698-711; Cade, *The Challenge of Seeing Justice Done*, *supra* note 31, at 46-75.

[36] Cade, *Enforcing Immigration Equity*, *supra* note 18, at 714-17.

[37] *Id.* at 715-16.

[38] *Id.* at 717-18.

[39] *Id.* at 719-23; Cade, *Return of the JRAD*, *supra* note 31, at 45-50; Cade, *The Challenge of Seeing Justice Done*, *supra* note 31, at 61-65.

criminal convictions must be predicated on considerations of individualized justice."[40] Government decision makers — including administrative agencies charged with meting out severe sanctions on a large scale — should be, in Michael Lipsky's words, "responsive to the unique circumstances of individual transgressions."[41] My prior work suggested that if the political branches do not take action to ensure the deportation system's commitment to proportionality and fairness, pressure to intervene would come to bear on federal courts.[42] As I develop in Part II of this article, it appears that concerns about disproportionate results have already motivated the Supreme Court to make equity-driven adjustments to the removal system over the past fifteen years, in a break from a long-standing policy of extreme deference to the political branches.[43]

II. STRUCTURING DEPORTATION DISCRETION IN THE MODERN SYSTEM

In this Part, I explain how key Supreme Court cases work to promote and structure the exercise of discretion in the modern deportation system. Across a diverse body of law, the modern Court has endeavored to preserve, restore, or create opportunities for the individual balancing of equities in deportation proceedings, including for noncitizens who have a criminal history or who lack lawful immigration status. For present purposes, the Court's decisions fall into five categories: (1) preserving federal discretionary enforcement authority, (2) promoting equitable considerations in cases involving noncitizens with criminal history, (3) curbing arbitrary and capricious charging discretion, (4) safeguarding procedural rights to reopen removal proceedings and to seek judicial review, and (5) regulating immigration detention. In the main, this Part considers each set of cases independently, although it also notes important overlaps and

[40] Cade, *Enforcing Immigration Equity*, *supra* note 18, at 724.

[41] MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 15 (2010) ("[S]ociety seeks not only impartiality from its public agencies but also compassion for special circumstances and flexibility in dealing with them.").

[42] Cade, *Enforcing Immigration Equity*, *supra* note 18, at 723-24.

[43] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relates, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."); Fong Yue Ting v. United States, 149 U.S. 698, 724-30 (1893).

interlocking connections. Part III will turn to the broader themes and implications of the Court's approach across the decisions.

A. Federal (Non-)Enforcement Discretion

In recent years, a number of states have passed laws attempting to give state and local officials a larger role in enforcing restrictions on the employment of noncitizens and other aspects of immigration law.[44] Some states have been transparent that the goal of such policies is to deter the entry or continued presence of undocumented noncitizens.[45] The Obama administration brought lawsuits against several of these states, including Arizona, endeavoring to invalidate their subfederal immigration controls on preemption grounds.[46] On June 25, 2012, the Supreme Court decided *Arizona v. United States*, which clarified the federal government's primacy in this area, although preserving some room for state activity.[47] The Court struck down most of the challenged provisions of Arizona's omnibus law, which essentially had created a state-level branch of the federal immigration enforcement system. Most remarkable about Justice Kennedy's majority opinion for the present inquiry is the degree to which it recognizes that equity in the deportation scheme today depends almost entirely on the exercise of prosecutorial discretion.[48] As a result, the Court's rulings in the case can be understood to structurally insulate the executive's ability to exercise its discretion so as to administer deportation law in a normatively just manner.[49]

At the outset, Justice Kennedy observed that a "*principle feature* of the removal system is the *broad discretion* exercised by immigration officials."[50] He then explicitly connected federal agencies' exercise of

[44] *See, e.g.*, ALA. CODE § 31-13-6 (2012); ARIZ. REV. STAT. ANN. § 11-1051 (2012); GA. CODE ANN. § 17-5-100(b) (2013); UTAH CODE ANN. § 76-9-100 to -109 (2013).

[45] *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2497 (2012) (noting that Arizona's S.B. 1070 establishes "an official state policy of 'attrition through enforcement,'" intended to "discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" (citations omitted)).

[46] *See* Jeremy Pelofsky & James Vicini, *Obama Administration Sues Arizona over Immigration Law*, REUTERS (July 6, 2010, 11:54 PM EDT), http://www.reuters.com/article/us-obama-immigration-lawsuit-idUSTRE6653Q320100707.

[47] *See* Arizona v. United States, 132 S. Ct. 2492.

[48] *See id.* at 2499.

[49] *See also* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 683-85 (analyzing the federal government's equity-based arguments in the *Arizona* litigation).

[50] Arizona v. United States, 132 S. Ct. at 2499 (emphasis added).

prosecutorial discretion to the implementation of equity in the deportation system:

> *Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all*. . . . Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. . . . *Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.*[51]

This language is striking in its candor about the realities of the modern immigration system. Prosecutorial discretion now plays a key role in shaping deportation policy, due to the overwhelming size of the potentially deportable population, the extraordinary breadth of the INA's removal provisions, and the dearth of opportunities for discretionary relief from removal at the adjudicative stage of proceedings.[52] Justice Kennedy's language acknowledges that not all noncitizens made deportable by Congress are similarly situated and that executive enforcement officials should weigh individual equities in determining the appropriateness of removal in particular cases. This stark endorsement of the central role of enforcement discretion in the modern deportation scheme — including discretion not to pursue persons who are formally removable — set the stage for the Court's preemption analysis of the challenged provisions of S.B. 1070.

Throughout its discussion of the challenged statutory provisions, the Court explained its preemption rulings in light of the value of the executive's implementation of equity through control over enforcement decisions. For example, in striking down section 3 of the state law (which criminalized noncitizens' failure to complete or carry an alien registration document), the Court emphasized the risk posed to the "integrated scheme" of regulation created by Congress, a scheme that envisions broad federal control over enforcement

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[51] *Id.* at 2499 (emphasis added).

[52] *See* SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 9-13 (2015); *supra* Part I and accompanying text.

decisions.[53] As stated by the Court: "Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies."[54] In other words, the Court was concerned that section 3 would enable state or local authorities to negate the federal government's determination not to penalize certain removable individuals, whether resulting from case-by-case evaluation or macro-enforcement priorities.

Justice Kennedy's analysis of section 6 of S.B. 1070, which would have given state officers authority to make warrantless arrests of any noncitizen whom the officer has probable cause to believe had committed a removable offense, centered on the same theme. As he explained:

> By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government. A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States.[55]

Here, too, the Court unabashedly recognized that the executive's role in setting deportation policy encompasses decisions not to enforce laws against deportable noncitizens. The Court found worrisome the possibility that state officers could subject noncitizens "whom federal officials determine should not be removed" to "unnecessary harassment."[56] To be sure, Congress has created opportunities for non-federal cooperative immigration enforcement. Nevertheless, emphasized Justice Kennedy, the scheme requires overarching supervision by federal immigration officials in light of the "significant complexities involved in enforcing federal immigration law."[57] Section 6, in contrast, would have given the state independent authority to implement the immigration system's most coercive and powerful tool

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[53] Arizona v. United States, 132 S. Ct. at 2502.

[54] *Id.* at 2503.

[55] *Id.* at 2506 (citations omitted).

[56] *Id.*

[57] *Id.*; *see also id.* at 2507 ("There may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government.").

— detention — without regard to federal decisions not to target or prosecute the detained individual. As the Court explained at the outset of the opinion, the federal decisionmaking threatened by S.B. 1070, and sections 3 and 6 in particular,[58] "embraces immediate human concerns" that may justify non-enforcement against even statutorily removable noncitizens.[59]

In contrast, the one provision of S.B. 1070 that survived preemption was perceived by the Court to aid, rather than threaten, the executive's ability to equitably implement deportation law. Section 2(B) mandates that state officers make a reasonable attempt to determine the immigration status of all persons who have been stopped, detained, or arrested on some other legitimate basis, if the officer has reasonable suspicion that the person is unlawfully present. Consultation and information sharing about potential immigration-violators, the Court observed, furthers Congress's design of the modern deportation system and does not interfere with federal control over the implementation of immigration priorities.[60] Unlike section 6, which would have allowed Arizona authorities to unilaterally determine immigration violations and detain on that basis alone, section 2(B) does not supply any independent grounds for police to make or to lengthen stops.

Scholars have questioned whether Section 2(B) might still give local authorities outsized influence over federal immigration caseloads, including through discriminatory policing tactics.[61] Because these scholars have suggested that equal-protection-based concerns influenced, at least in part, the preemption rulings in Arizona, the Court's decision not to strike down section 2(B) is seen as a

[58] The Court's invalidation of section 5(C), criminalizing noncitizens who engage in unauthorized employment, also reflected concern that the state law would threaten the Executive's ability to balance priorities in enforcement, although the Court tied that aspect of its holding more directly to Congress's considered decision not to impose criminal penalties for unauthorized employment. *See id.* at 2505.

[59] *Id.* at 2499.

[60] *Id.* at 2508-09; *see also id.* at 2527 (Alito, J., concurring in part and dissenting in part) ("At bottom, the discretion that ultimately matters is not whether to verify a person's immigration status but whether to act once the person's status is known. . . . [T]he Federal Government retains the . . . discretion to enforce the law in particular cases.").

[61] *See, e.g.*, MOTOMURA, *supra* note 11, at 130-42; Chacón, *Immigration Federalism*, *supra* note 11, at 580 ("[I]n upholding Section 2(B), the Court left in place a provision that was a source of deep concern for opponents of the law, and effectively green-lighted systematic state and local participation in immigration enforcement in a way that failed to account for the inevitable discriminatory effects of such participation.").

contradiction or mistake.[62] Perhaps so, but if the Court's primary concern regarding modern immigration enforcement is proportionality, rather than discrimination,[63] then a state law aimed at securing and sharing information about the whereabouts and activities of noncitizens merely facilitates the federal executive's ability to establish and act on enforcement priorities.[64] To be clear, I see no reason to dispute the claim that state or federal laws such as section 2(B) increase the risk of discriminatory policing at the local level.[65] Rather, the relevant point for present purposes is that the Court closely tied its preemption analysis of each of the challenged provisions in *Arizona* to its perception that the federal government must retain broad discretion to decide "whether . . . to pursue removal at all,"[66] and recognizing the significance of this newfound acknowledgement of the role of enforcement-driven proportionality in the deportation system helps explain its preemption rulings.

The outcome of *Arizona* took many by surprise.[67] Recent federal case law in the immigration field had given state lawmakers reason to believe their controls would survive on a "mirror image" theory. In *Chamber of Commerce v. Whiting*, decided only a year before *Arizona*, the Court upheld a different provision of Arizona's law, which required employers to use a federal database to check whether

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[62] *See* MOTOMURA, *supra* note 11, at 130-42; Chacón, *Immigration Federalism*, *supra* note 11, at 609-17; Guttentag, *supra* note 11, at 41 ("If immigrant equality were acknowledged as a core value of federal law, evidence that Section 2B increases the danger of profiling or discrimination would properly be part of the preemption analysis rather than be marginalized as an entirely distinct claim.").

[63] At the outset of the Solicitor General's oral argument in *Arizona*, Chief Justice Roberts interjected: "Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it? I saw none of that in your brief. . . . So this is not a case about ethnic profiling." Transcript of Oral Argument at 34, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[64] *Cf.* Adam Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 61-62 (2012).

[65] Indeed, some of my previous work focuses on that very issue. *See* Cade, *Policing the Immigration Police*, *supra* note 31.

[66] Arizona v. United States, 132 S. Ct. at 2499; *see also id.* at 2521 (Scalia, J., dissenting) ("But to say, as the Court does, that Arizona *contradicts federal law* by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind." (emphasis in original)).

[67] *See* Kevin R. Johnson, *Immigration in the Supreme Court 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 87, 91 (2015) [hereinafter *Immigration in the Supreme Court*] (noting that the result in *Arizona v. United States* "surprised many observers who predicted that the conservative Roberts Court would uphold the law in its entirety").

potential noncitizen employees are federally authorized to work, even though federal law does not make use of the verification system mandatory.[68] In *Arizona*, however, the Court declined to employ the states-can-mirror-federal-law reasoning, focusing instead on the need to protect federal choices regarding prosecutorial discretion from disruption.[69]

The Court's expansive conception of preemption in *Arizona* has both detractors and supporters within the legal academy.[70] In Kevin Johnson's view, the Court's approach was in line with other recent preemption rulings.[71] Other commentators have noted, however, that *Arizona* does not conform to traditional preemption analysis.[72] Adam Cox, for example, observed that it is common for states to help

[68] Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011). Arguably, however, what really mattered in *Whiting* was the carve-out in the applicable federal law. IRCA, while expressly preempting state employer sanctions, does allow states to use "licensing and similar laws," 8 U.S.C. § 1324a(h)(2) (2012), which is what Arizona had done with the state statute at issue. *Cf.* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 80-81 ("*Whiting* is a narrowly drawn decision dealing with the interpretation and application of the language of the Immigration Reform and Control Act. The Court carefully adhered to the plain meaning of the statute, which expressly preserves state authority to exercise the licensing power to facilitate enforcement of the employer sanctions provisions of the federal immigration law.").

[69] David S. Rubenstein, *Immigration Structuralism*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 87 (2013) [hereinafter *Immigration Structuralism*] (noting that the "proffered conflict was between executive policies that focus enforcement resources on targeted subclasses of unlawfully present immigrants and Arizona's arrest-and-report laws that target a generic and undifferentiated class of undocumented immigrants").

[70] *Compare* David S. Rubenstein, *Black-Box Immigration Federalism*, 114 MICH. L. REV. 983, 993-1004 (2016) (arguing that only the Constitution, statutes, and treaties — not executive enforcement policies — can provide a constitutional basis to preempt state laws), *with* MOTOMURA, *supra* note 11, at 130-42 (arguing that preemption analysis in immigration law necessarily involves a decision about the relative risk of unconstitutional activity by enforcers, and defending the *Arizona v. United States* decision on the ground that nonfederal actors are more like to violate constitutional rights of noncitizens when enforcing federal immigration law), *and* Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691 (2014) (undertaking a functionalist defense of the preemption decisions in *Arizona v. United States*, in light of the unique context of modern immigration law).

[71] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 86-91 (describing the preemption rulings in *Arizona v. United States* as "unremarkable" and citing, *inter alia*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000) and *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003)); *see also* Harlan G. Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. 380, 406-08, 415-16, 438-39 (2015) (discussing connections between *Crosby*, *Garamendi*, and *Arizona v. United States*).

[72] *See, e.g.*, Cox, *supra* note 64; David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012).

enforce federal laws.[73] States regularly make arrests for violations of federal criminal law, or attach state penalties to conduct proscribed by federal law. The courts have typically viewed such "enforcement redundancy" as acceptable and consonant with federal goals.[74] The result is that, in many areas of law enforcement, state efforts to reinforce federal controls are constitutional.[75]

Whatever else might be said about this debate, the key point for present purposes is that the Court in *Arizona* squarely recognized that the enforcement stage is now the primary point at which equitable discretion comes into play for the great majority of deportable noncitizens.[76] The Court's decision preserved the primacy of federal supervision of enforcement discretion, tying its reasoning to the realities of a system characterized by staggeringly broad grounds of deportability and abandonment of formal adjudicative discretion. Importantly, the federal enforcement discretion preserved by the Court in *Arizona* is not contingent upon immigration status. Instead, the decision contemplates and endorses enforcement authorities' consideration of the appropriateness of initiating proceedings against any deportable noncitizen, including persons unlawfully present.[77]

As I develop further in Part III, however, it is crucial to recognize that the Court's ruling in *Arizona* falls far short of ensuring proportionality, nondiscrimination, or rationality in the removal system.[78] Clearly, federal enforcement officials might fail to balance equities or to enforce the law in a nondiscriminatory manner when making removal decisions. Thus, *Arizona* merely preserves the *potential* for targeted and sensible equity-based enforcement decisions made at the federal level.[79] That said, to the extent the Court wishes

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[73] *See* Cox, *supra* note 64, at 34-41; *see also* Ernest A. Young, "*The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 255 (2011).

[74] *See* Cox, *supra* note 64, at 34-41.

[75] *See id.* at 41-48.

[76] *See* Transcript of Oral Argument at 44-45, Torres v. Lynch, No. 14-1096 (U.S. Nov. 3, 2015), 2015 WL 9919328 (Chief Justice John Roberts suggesting that if the aggravated felony category sweeps too broadly, "the attorney general may decide not to subject the alien to removal in the first place, right?").

[77] *See infra* Part III.A (discussing the applicability of the Court's deportation rulings to undocumented noncitizens).

[78] *See infra* Part III.C.

[79] *See* MOTOMURA, *supra* note 11, at 130-42 (defending the *Arizona v. United States* decision for its implied recognition that nonfederal actors are more like to violate constitutional rights of noncitizens when enforcing federal immigration law); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California Trust Act*, 18 CHAP. L. REV. 481, 523 (2015)

for the legislature (or the judiciary, within institutional constraints) to be able to further shape or regulate executive policy in immigration law, that task is somewhat easier when the appropriate enforcement body is centralized and federal, rather than a multitude of state and local regulators.

B. Equitable Considerations in Cases Involving Criminal History

The centrality of criminal history in triggering deportation delegates de facto power to screen for undesirable noncitizens to law enforcement actors in the criminal justice system.[80] Indeed, the outcome of criminal proceedings determines not only whether a noncitizen is removable, but also whether the person may be subject to detention, foreclosed from seeking discretionary relief, or barred from ever returning lawfully to the United States.[81] The now almost-automatic linkage between these harsh consequences and a criminal court conviction dramatically raises the stakes of choices made by prosecutors, defense attorneys, and noncitizen defendants. While the Obama administration appeared to recognize an obligation to enforce deportation laws equitably,[82] its enforcement agency deported more noncitizens in eight years than at any other time in United States history.[83] The administration also largely declined to differentiate among so-called "criminal aliens," treating almost any kind of criminal history as an "irrefutable signifier of undesirability in the modern deportation system."[84] Recent rulings suggest that this aggressive

("Federal exclusivity has the potential to prevent the erosion of anti-discrimination principles resulting from increasing involvement of sub-federal agents in immigration enforcement.").

[80] Cade, *Enforcing Immigration Equity*, *supra* note 18, at 682-83; *see also* Padilla v. Kentucky, 559 U.S. at 365-66 (noting that many immigration consequences now follow automatically from criminal convictions); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1350 (2010) ("With mandatory deportation rules, the criminal prosecutor becomes the immigration screener."); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV 1126, 1156-96 (2013) [hereinafter *Criminal Justice for Noncitizens*]; Lee, *supra* note 27, at 572-77; Motomura, *The Discretion that Matters*, *supra* note 27, at 1852-53.

[81] *See supra* Part I.

[82] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 687-98 (explaining the Obama administration's targeted distribution of resources, prosecutorial discretion initiatives, and categorical reprieves such as DACA and DAPA).

[83] Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 74 (2015) [hereinafter *Deferred Action*].

[84] Cade, *Return of the JRAD*, *supra* note 31, at 42-44; *see also* Cade, *Enforcing*

approach to enforcement of the INA's broad criminal law provisions troubles a majority of the Supreme Court. As the following sections explain, the Court has issued a series of decisions that reflect deep concerns about inequitable deportations based on criminal history.[85]

1. Making Deals

The Court's discomfort with the punitive and inflexible turn that immigration law took in the 1990s first surfaced in its 2001 decision *INS v. St. Cyr*.[86] Enrico St. Cyr was a Haitian citizen who became a lawful permanent resident of the U.S. in 1986. St. Cyr pled guilty to sale of a controlled substance, a few months before Congress installed the modern immigration law structure by enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[87] The Court first had to decide an important procedural question, which was whether Congress's amendments to the INA in 1996 eliminated habeas corpus review. Employing the constitutional avoidance canon to find such review still intact,[88] the substantive question before the Court was whether St. Cyr could seek the exercise of remedial equitable discretion by an immigration judge pursuant to a repealed provision of the INA, known as 212(c), because his conviction had occurred before the repeal.[89] In an opinion by Justice Stevens, the Court observed that Congress's broadening of the deportation provisions in the early 1990s meant that an "extremely large" number of noncitizens had relied on equitable adjudicative relief in order to remain in the United States prior to the repeal of 212(c). Indeed, the Court observed that, "not surprisingly," over half of noncitizens' applications for 212(c) relief had been granted by immigration judges.[90]

Immigration Equity, *supra* note 18, at 700-09; Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 WASHBURN L.J. 173, 173-74 (2015) (arguing that DACA and DAPA criteria entrench a "significant misdemeanor" bar to eligibility).

85 *See infra* Part III.A.

86 533 U.S. 289 (2001).

87 *Id.* at 289.

88 The Court found the absence of an alternative forum, coupled with the lack of an unambiguous and express statement of congressional intent to preclude all habeas review, counseled against a statutory construction that would raise serious constitutional questions. *Id.* at 298-314.

89 *Id.* at 292-93.

90 *Id.* at 296.

Addressing the government's argument that the elimination of 212(c) applied retroactively to bar St. Cyr from seeking equitable relief, the Court expressed unease with the contention that the "[l]egislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration."[91] As a result, the Court articulated and applied a presumption against retroactive elimination of discretionary relief in favor of St. Cyr.[92] The Court held that Congress would need to provide an unambiguous, clear statement if it intended that persons deportable on the basis of convictions obtained before IIRIRA should be ineligible for the balancing of equities that, before 1996, had long marked U.S. deportation law.

The Court's rulings in *St. Cyr* were controversial. The principle of constitutional avoidance, for example, provided less than airtight support for the Court's decision on 212(c), because it had held many times that the ex post facto clause does not apply in the civil immigration context, leaving Congress free to make retroactive-looking changes to deportation law.[93] Even so, background concerns about discretionary justice carried the day for St. Cyr, as the majority emphasized the unfairness of retroactively disadvantaging defendants who might have pleaded guilty to certain crimes in reliance on the possibility that section 212(c) could safeguard them from deportation.[94] Put simply, Justice Stevens's opinion signaled the Court's emerging worries about the wooden and inhumane operation of the modern-day immigration system. And these same concerns have resurfaced in numerous immigration decisions issued in the wake of *St. Cyr*.

Vartelas v. Holder, for example, involved another provision of IIRIRA that changed the rules for Lawful Permanent Residents (LPRs) with past convictions.[95] Historically, LPRs could travel abroad without needing to apply for re-admission to the United States, so long as the

[91] *Id.* at 315 (internal quotation marks omitted) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994)).

[92] *Id.* at 315-16.

[93] *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 38 (1990); Lehmann v. United States, 353 U.S. 685, 690 (1957); Marcello v. Bonds, 349 U.S. 302, 314 (1955); Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952).

[94] *St. Cyr*, 533 U.S. at 315, 320-25; *see also* Padilla v. Kentucky, 559 U.S. 356, 368 (2010) ("[W]e have recognized that 'preserving the possibility of' discretionary relief from deportation under § 212(c) of the 1952 INA, repealed by Congress in 1996, 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial.'").

[95] Vartelas v. Holder, 132 S. Ct. 1479 (2012).

excursion was "innocent, casual, and brief."[96] As amended in 1996, however, the statute deems LPRs who travel abroad as presumptively inadmissible if they fall into any of six categories.[97] One of these categories tracks the statutory grounds for criminal-based inadmissibility, barring from readmission any permanent resident who has committed, for example, a controlled substance offense, a crime involving moral turpitude, or more than one conviction of any type.[98] This amendment worked a significant change in the legal framework, because the grounds of deportability are generally narrower than the grounds of inadmissibility and because noncitizens seeking admission have the burden to demonstrate admissibility, whereas the government bears the burden when it seeks to deport an LPR.[99]

Panagis Vartelas had been a permanent resident for over 20 years when he was put into removal proceedings upon return from a one-week trip to Greece.[100] Because Vartelas had a 1994 conviction for conspiracy to counterfeit (a crime involving moral turpitude), an immigration officer classified him as seeking admission.[101] He was put into removal proceedings, found inadmissible, and ordered removed.[102]

Justice Ginsburg's opinion for a six-Justice majority highlighted some of Vartelas's equities, including long residence and gainful employment in the United States.[103] With respect to the context of the underlying conviction, the Court observed that although Vartelas "helped his [business] partner perforate the sheets into individual checks," he personally "did not sell the checks or receive any money

96 *Id.* at 1484 (quoting Rosenberg v. Fleuti, 374 U.S. 449, 461-62 (1963)).

97 *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(13)(C) (2012).

98 *Id.* § 1101(a)(13)(C)(v) (providing that LPRs must seek re-admission if they have "committed an offense identified in section 1182(a)(2) of this title"); *see, e.g.*, *id.* § 1182(a)(2)(A)(i)(I) (crimes involving moral turpitude); *id.* § 1182(a)(2)(A)(i)(II) (controlled substance offenses); *id.* § 1182(a)(2)(B) (multiple criminal convictions of any type); *id.* § 1182(a)(2)(D) (prostitution or commercialized vice); *id.* § 1182(a)(2)(I) (money laundering).

99 For example, LPRs are only deportable for a conviction involving moral turpitude if committed within five years of entry to the United States. *Id.* § 1227(a)(2). Additionally, one must have an actual conviction to trigger the deportation ground, while the grounds of admissibility can be triggered even without a conviction.

100 *See Vartelas*, 132 S. Ct. at 1485.

101 *Id.*

102 *Id.* at 1485-86.

103 *Id.* at 1485; *see also id.* at 1487-88 ("It is no answer to say, as the Government suggests, that Vartelas could have avoided any adverse consequences if he simply stayed at home in the United States, his residence for 24 years prior to his 2003 visit to his parents in Greece.").

from the venture."[104] And the reason Vartelas traveled abroad, wrote Justice Ginsburg, was "to visit his aging parents."[105]

The Court also noted that Vartelas's first two attorneys in his deportation proceedings had been highly ineffective.[106] One failed to appear for two hearings and did not file a requested brief, while the other undertook a doomed strategy of conceding removability and seeking a waiver of the inadmissibility grounds. After Vartelas's deportation order became final, a third attorney filed a timely motion to reopen, alleging that the statutory provision at issue did not apply retroactively to deprive Vartelas of lawful status on the basis of a pre-IIRIRA conviction.[107]

Regarding the merits, the Court was "[g]uided by the deeply rooted presumption against retroactive legislation."[108] This presumption, the Court noted, "embodies a legal doctrine centuries older than our Republic."[109] The Court agreed with Vartelas's contention that applying IIRIRA retroactively attaches a "new disability" to his past conviction. In particular, application of the new provision to persons like Vartelas would burden their ability to travel abroad "to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies."[110] The Court found the loss of the ability to journey outside of the country to be a draconian sanction.[111]

The majority was particularly troubled that the law reached past criminal history long "over and done" before the new provision came into effect.[112] Indeed, the Court suggested the retroactivity issue in *Vartelas* was even more problematic than the provision considered in *St. Cyr*. St. Cyr's guilty plea had left him with only the *possibility* of

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104 *Id.* at 1485.

105 *Id.*

106 *See id.* at 1485-86.

107 *Id.* at 1486. The BIA denied the motion to reopen on the grounds that prior counsel's ineffective assistance had not prejudiced Vartelas because no law prevented retroactive application of IIRIRA's admission provision. The Second Circuit affirmed.

108 *Id.* at 1484.

109 *Id.* at 1486 (internal quotation marks omitted) (citing Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994)).

110 *Id.* at 1487.

111 *See id.* at 1488.

112 *Id.* at 1487; *see also id.* at 1489 ("Vartelas, we have several times stressed, engaged in no criminal activity after IIRIRA's passage. . . . Vartelas was apprehended because of a pre-IIRIRA crime he was 'helpless to undo.'"); *id.* at 1490 ("That new disability rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA's enactment.").

seeking discretionary relief from removal. Vartelas's plea, in contrast, did not expose him to deportation and left him free to make brief, unencumbered trips abroad until IIRIRA went into effect.[113]

Justice Scalia's dissenting opinion, which was joined by Justices Thomas and Alito, confirmed the equity-driven nature of the majority's ruling. Indeed, Justice Scalia scolded the majority for contorting the statutory text in order to reach a "fair" result in the case.[114] The dissenters reasoned that the relevant activity was not Vartelas's plea, but rather his later departure and reentry to the United States, which in this case occurred years *after* the effective date of IIRIRA.[115]

Vartelas, like *St. Cyr*, exhibited the Court's concern with the retroactive attachment of harsh immigration consequences to past criminal history. Although the Court did not invalidate the statute at issue in *Vartelas*, it again applied an anti-retroactivity norm to the operation of the provision in a way that exempted from its reach LPRs with old convictions.[116] As discussed further below, the case also illustrates the importance of post-order motions to reopen as vehicles for injecting some equity into the removal system,[117] as well as the Court's related concerns about avoidable deportations due to shoddy lawyering, which lurks as an important background factor in a number of the Court's decisions.[118]

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[113] Although the Court made clear that a noncitizen need not demonstrate actual reliance on the pre-IIRIRA legal regime to benefit from the anti-retroactivity principle, Justice Ginsburg speculated that "Vartelas likely relied on then-existing immigration law" when he pleaded guilty in 1994. *Id.* at 1491-92. The Court also observed that Congress did not expressly indicate that the statutory provision would have retroactive effect, while other provisions of IIRIRA did indicate retroactive application. *Id.* at 1487.

[114] *Id.* at 1495-96 (Scalia, J., dissenting).

[115] *See id.* at 1492-93, 1496. Seen from that viewpoint, the 1996 amendment simply was not retroactive. *See id.* at 1493-94.

[116] Vartelas did not challenge the agency's determination that Congress abrogated the Court's *Fleuti* doctrine, which had protected LPRs who briefly sojourn abroad from application of the INA's inadmissibility provisions. *See generally* THOMAS ALEXANDER ALEINEKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY (7th ed. 2012) (discussing the admission procedures). The *Vartelas* Court noted in a footnote that it was assuming, but not deciding, that the agency's determination that *Fleuti* was prospectively abrogated was correct. *Vartelas*, 132 S. Ct. at 1484, n.2.

[117] *See infra* Part II.D.

[118] *See infra* text accompanying notes 119–39, 262–71 (discussing *Padilla* and *Mata*). On the quality of representation in immigration proceedings generally, *see* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (2015).

The Court's discomfort with the inflexible operation and harsh consequences of current deportation rules was even more apparent in its 2010 decision in *Padilla v. Kentucky*,[119] which took the rare step of regulating an aspect of the removal system through a constitutional criminal procedure ruling.[120] The Court's watershed holding in that case — that the Sixth Amendment requires criminal defense counsel to render effective advice about the potential immigration consequences of a conviction — marked a significant departure from the views of lower federal courts.[121] For a majority of the Court, this result was firmly rooted in the new realities of federal immigration law, including the evisceration of opportunities for leniency in the face of criminal convictions.

As in many other recent deportation cases, Justice Stevens's opinion for a majority of the Court emphasized the petitioner's equities, describing Jose Padilla as a "lawful permanent resident of the United States for more than 40 years" who "served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War."[122] Padilla got into trouble when a large quantity of marijuana was discovered in his tractor-trailer. Thereafter, relying on erroneous advice from his counsel, he pleaded guilty to drug charges that in fact made deportation virtually automatic.

Observing that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years,"[123] the Court catalogued congressional initiatives that have come to bear on noncitizens such as Padilla. It noted that for much of the twentieth century the grounds of

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[119] Padilla v. Kentucky, 559 U.S. 356 (2010).

[120] The rarity of a constitutional holding in this area is underscored by the fact that even the Court's substantive *criminal law* decisions are usually decided through subconstitutional means. *See* Kate Stith-Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 COLO. L. REV. 1523, 1548 (2003); *see generally* Motomura, *Phantom Constitutional Norms*, *supra* note 16 (explaining that the Court's decisions concerning noncitizens' rights typically employ subconstitutional analysis, albeit informed by "phantom" constitutional norms).

[121] *See Padilla*, 559 U.S. at 383 (Alito, J. and Roberts, C.J., concurring) (calling the majority's decision "a major upheaval in Sixth Amendment law" and noting that "the Court's view has been rejected by every Federal Court of Appeals to have considered the issue thus far"); *see also* Chaidez v. United States, 133 S. Ct. 1103, 1106 (2013) (determining that *Padilla* constituted a new rule and should not have retroactive effect). Justice Stevens, who had authored the majority opinion in *Padilla*, expressed disappointment about the Court's ruling in *Chaidez* in a post-retirement interview. *See* Linda Greenhouse, *Speaking Truth to the Supreme Court*, N.Y. TIMES (April 16, 2015), http://www.nytimes.com/2015/04/16/opinion/speaking-truth-to-the-supreme-court.html.

[122] *Padilla*, 559 U.S. at 359.

[123] *Id.* at 360.

criminal removal were narrow. The Court emphasized the loss of mitigating mechanisms through the repeal of INA section 212(c) and congressional negation of the ability of sentencing judges to issue a Judicial Recommendation Against Deportation, which Justice Stevens described as "a critically important procedural protection to minimize the risk of *unjust* deportation."[124] The Court zeroed in on the fact that "immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation," with the result that "the drastic measure of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[125]

Padilla directly speaks to a distinct consequence of modern immigration law's unbending reliance on criminal history — namely, that a large number of noncitizens might plead guilty to offenses triggering their deportation without adequate notice. It would be constitutionally unfair, the Court reasoned, to allow persons to plead guilty without being aware that the penalty of deportation would follow. Rooted in the Sixth Amendment's command that criminal defendants be afforded adequate assistance of counsel, the decision as a technical matter puts constitutional obligations only on criminal defense attorneys. As a practical matter, however, the ruling will pressure prosecutors and judges to ensure that defense attorneys have adequately advised their clients so that convictions cannot be later be undone on ineffective assistance grounds.[126]

The constitutional holding in *Padilla* performs equitable work in two ways. First, the Court's regulation of the fairness of noncitizens' plea bargains in criminal court counteracts, to some degree, the special risks of unfairness posed in deportation proceedings, which the Court cannot so easily regulate.[127] Because deportation has long been held not to constitute criminal punishment, there is no constitutional right to the assistance of counsel in immigration court.[128] The Fifth

[124] *Id.* at 361 (emphasis added); *see also* Cade, *Return of the JRAD*, *supra* note 31, at 38-41 (discussing Congress's abrogation of the JRAD).

[125] *Padilla*, 559 U.S. at 360.

[126] *Cf.* Anne R. Traum, *Constitutionalizing Immigration Law on Its Own Path*, 33 CARDOZO L. REV. 491, 501 (2011) ("As a practical matter, state and federal prosecutors, and by extension defense lawyers, play an important role in determining which noncitizens will be deported permanently or with the possibility of administrative relief.").

[127] *See* Christopher N. Lasch, *"Crimmigration" and the Right to Counsel at the Border Between Civil and Criminal Proceedings*, 99 IOWA L. REV. 2131, 2150 (2014).

[128] *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that deportation is not punishment).

Amendment requires that deportation procedures satisfy due process,[129] but, because of a longstanding pattern of extreme judicial deference in this area, Congress has enjoyed a virtual blank check when it comes to formulating the substantive rules of removal.[130] The Sixth Amendment right espoused in *Padilla* thus gives noncitizens a form of stand-in protection, operating to guard against the most inequitable crime-based deportations — namely, those deportations that result from guilty pleas in which the noncitizen's defense attorney failed to give sound advice regarding a critical life choice.[131]

The Court also pursued a second equitable goal in *Padilla*, by encouraging actors in the criminal proceedings to evaluate the potential immigration consequences in their framing of charges, pleas, and sentences.[132] As the Court explained:

> By bringing deportation consequences into the process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. . . . *Counsel . . . may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence*.[133]

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[129] *See* Landon v. Plascencia, 459 U.S. 21, 33 (1982); Yamataya v. Fisher, 189 U.S. 86, 99-100 (1903).

[130] *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977); *Fong Yue Ting*, 149 U.S. at 713; The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

[131] *See* Cesar Cuauhtemoc Garcia Hernandez, *Strickland-Lite: Padilla's Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 848 (2013); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 307 (2012); Lasch, *supra* note 127, at 2149; Traum, *supra* note 126, at 529-30.

[132] *See* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395 (2011) ("The majority opinion predicts and intends that the *Padilla* rule will change the substantive outcomes of plea bargaining between prosecutors and the defense . . . ."); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1743 (2011) ("The purpose of enforcing a duty to advise is not merely to ensure that the defendant is aware of the consequences of his or her conviction, but to provide the defendant with the opportunity to seek a more desirable result through a plea bargain.").

[133] Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (emphasis added).

The relevant equitable frame for decisionmaking — including by government lawyers — thus includes not just the criminal sanction but also the immigration penalty.[134] The Court again underscored the "severity of deportation — 'the equivalent of banishment or exile,'"[135] directly acknowledging the need for a negotiation structure to avert or minimize the possibility of removal in appropriate cases. Indeed, this appears to be one of the reasons the Court interpreted the Sixth Amendment not only to prohibit misadvice, such as that received by Padilla, but also to impose an affirmative obligation on counsel to provide accurate information about immigration consequences.[136]

Thus, *Padilla*'s Sixth Amendment rule infuses defense attorneys' predictive obligation with a normative character. Attorneys representing noncitizens must be knowledgeable about immigration law and their client's circumstances in order to accurately forecast the immigration consequences likely to follow the relevant convictions. But, in addition, Justice Stevens's opinion anticipates and even expects that defense attorneys will help their clients avoid unjust immigration consequences through "creative plea bargaining."[137] Although *Padilla* alone does not elevate that equitable expectation to a mandate, the Court's recent decision in *Lafler v. Cooper* suggests that defendants are constitutionally entitled to the going-rate for plea opportunities in their jurisdiction.[138] Thus, it may well be that in localities where

[134] *See* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky: *The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1504 (2011) ("[T]he criminal process is simply the envelope within which the potential deportation sanction happens to be packaged.").

[135] *Padilla*, 559 U.S. at 373 (citing Delgadillo v. Carmichael, 332 U.S. 388, 390-91 (1947)).

[136] *See id.* at 374.

[137] *See* Cade, *Plea Bargain Crisis*, *supra* note 31, at 1772-75; Bill Ong Hing, *The Pressure Is On — Criminal Defense Counsel Strategies After* Padilla v. Kentucky, 92 DENV. L. REV. 835, 835 (2015) (arguing that defense counsel should engage strategies to avoid or minimize the immigration consequences of convictions for lawfully present noncitizens); Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. L. REV. 933, 934 (2015) (arguing that "the *Padilla* duty requires defense attorneys to . . . attempt to negotiate immigration-safe pleas").

[138] *See* Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012) (holding that "loss of the plea opportunity" that defendant "would have received in the ordinary course" fell below constitutional standards of representation); *see also* Bowers, *Baselines*, *supra* note 17, at 1105 (arguing that as a consequence of *Lafler* and *Missouri v. Frye*, courts must consider "party-driven 'practice law'" to evaluate whether defendant received what he would have "in the ordinary course" for purposes of the Sixth Amendment analysis); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2560, 2660-65 (2013) (arguing that the Court's recent plea bargaining cases provide support "for a

immigration-specific plea-bargaining is or becomes standard practice, defense attorneys who fail to competently engage in such bargaining will fall below constitutional minimums.[139]

Undoubtedly, in particular jurisdictions or with particular prosecutors, it might not be fruitful for a defense lawyer to focus attention on the client's immigration status. Many prosecutors disagree that immigration consequences are relevant to the criminal charge whatsoever, while others may view deportation of noncitizen defendants as a desirable outcome.[140] But many prosecutors — in part because they routinely make equity-driven charging and plea-bargaining choices — may well consider assessment of severe direct or collateral consequences to be part of their duty to see that justice is done.[141] As the norms of *Padilla* become internalized in the criminal justice system over time, bargaining over deportation consequences may well become commonplace.[142] The overarching message of *Padilla*

constitutional right to effective bargaining," judged by "counsel's success or failure in following prevailing professional norms").

[139] *See* Bowers, *Baselines*, *supra* note 17, at 1105-06 (suggesting that the Court's recent plea bargain cases may entitle criminal defendants to "'creative' bargaining that is designed to circumvent legally permissible trial charges and sentences"); Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1153-54, 1159-60 (2013); Roberts, *supra* note 138, at 2668.

[140] *See, e.g.*, Heidi Altman, *Prosecuting Post-*Padilla: *State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 101 GEO. L.J. 1, 28-32 (2012) (presenting data on range of attitudes in Brooklyn district attorney's office regarding appropriateness of taking immigration consequences into account during plea bargaining); Brown, *supra* note 132, at 1400-02 (arguing that prosecutors are unlikely to be sympathetic or to enjoy much charging leeway in high-volume drug trafficking cases); Eagly, *Criminal Justice for Noncitizens*, *supra* note 80, at 1156-96 (discussing three prosecutors' offices where alienage is variously treated as a neutral or negative factor); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016) (discussing the structural incentives that lead prosecutors to influence collateral consequences).

[141] *See, e.g.*, DAVIS, *supra* note 26; LIPSKY, *supra* note 41, at 22 (discussing prosecutors' use of alternative charges to avert harsh mandatory drug sentences where unjustified by the defendants actual circumstances); Bowers, *Legal Guilt*, *supra* note 25, at 1686-87 (discussing the greater deference prosecutors receive in determining what to charge); Stith, *The Arc of the Pendulum*, *supra* note 25, at 1435 (discussing efforts by The Sentencing Commission to restrain prosecutorial discretion).

[142] *See, e.g.*, Altman, *supra* note 140, at 34-35 (arguing that professional responsibility standards and proportionality concerns do or will lead many prosecutors to individually evaluate justifiability of deportation); Eagly, *Criminal Justice for Noncitizens*, *supra* note 80, at 1156-96 (discussing prosecutors' offices with charging policies that benefit noncitizens); Robert M. A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS PUB. L. REV. 129, 130 (2011) (arguing that *Padilla* will directly and indirectly influence prosecutors' consideration of collateral consequences, presenting an opportunity to both do "justice and improve public safety").

— a message both accurate and practically significant — is that immigration enforcement is now highly dependent on the outcome of criminal law and process. In such a world, it makes little sense for prosecutorial officials (or the judges with whom those officials routinely interact) to turn a blind eye to the immigration consequences of prosecutorial decisions. Until Congress rolls back the breadth and reach of criminal deportation rules, the burden of helping the system achieve proportionality will fall heavily on criminal-justice-system actors, a reality that the Court plainly envisioned in *Padilla*.[143]

2. Preserving Deals and Discretion

If one goal of *Padilla* was to create opportunities for noncitizen defendants to reach plea deals that avoid deportation or that preserve possibilities for equitable discretionary relief in later deportation proceedings, still other cases decided over the last decade have worked toward the same objective by narrowing the range of criminal convictions that trigger mandatory removal. These decisions primarily have involved challenges to the immigration consequences of drug convictions that, while given lenient treatment under state law, were charged as aggravated felony deportation grounds by ICE prosecutors in efforts to foreclose the possibility of equitable relief.[144] The Roberts Court has repeatedly rejected these efforts by stringently requiring a categorical match between the elements of the criminal offense and the removal ground.[145] Through these cases, the Court has reigned in the harshest interpretations of the criminal removal provisions and

[143] *See* Hing, *supra* note 137, at 835 (arguing that the constitutional duty of *Padilla* places "tremendous pressure on defense counsel"); Sharpless, *supra* note 137, at 934 (discussing the duties of defense attorneys in light of the decision in *Padilla*); *cf.* Stacy Caplow, *Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation*, 22 B.U. PUB. INT. L.J. 293 (2013) (arguing that governors should pardon noncitizens in appropriate cases in order to remove the prospect of deportation).

[144] Aggravated felonies make noncitizens subject to mandatory detention, ineligible for discretionary relief from deportation, and permanently prohibited from lawful return to the U.S. *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (2012) (aggravated felony bar to lawful admission to the United States); *id.* § 1158(b)(2)(B)(i) (aggravated felony bar to asylum and withholding of removal); *id.* § 1229b(a)(3) (aggravated felony bar to cancellation of removal for LPRs); *id.* § 1229b(b)(1)(C) (aggravated felony bar to cancellation of removal for non-LPRs).

[145] Two notable exceptions from the general thrust of this strict categorical approach, *Nijhawan v. Holder* and *Torres v. Lynch*, are discussed below. *See infra* text accompanying notes 207–14.

safeguarded at least limited opportunities for equitable decisionmaking in deportation proceedings.

In *Carachuri-Rosendo v. Holder*,[146] for example, decided during the same term as *Padilla*, the government pressed the argument that Carachuri-Rosendo's two minor state-law drug possession crimes would have made him a felony recidivist drug offender under the Controlled Substances Act, had he been federally prosecuted.[147] A federal recidivist drug conviction would be deemed an aggravated felony, thereby disqualifying Carachuri-Rosendo from cancellation of removal or other discretionary relief. Carachuri-Rosendo conceded his deportability for a controlled substance violation, but argued that the aggravated felony ground of removal was inappropriate since he had not actually been charged as a recidivist.[148]

As in *Padilla*, Justice Stevens's opinion for the Court began by cataloguing Carachuri-Rosendo's longstanding ties to the United States, along with other facts that nudged the scales in favor of leniency.[149] The Court then framed Carachuri-Rosendo's criminal history in a sympathetic light: "Like so many in this country, Carachuri-Rosendo has gotten into some trouble with our drug laws."[150] The Court noted, however, that petty simple possession does not comport with the "'everyday understanding'" of what it means to engage in drug trafficking.[151] Indeed, the Court found the government's characterization of "unauthorized possession of a trivial amount of a prescription drug" as an aggravated felony to be, "to say the least, counterintuitive and 'unorthodox,'" especially when the defendant had received only a 10-day sentence.[152] Endorsing a "'common sense conception'" of the statute, the Court declared it was "very wary" — in fact, "doubly wary" — of the government's position.[153]

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146 560 U.S. 563 (2010).

147 *See id.* at 575-78.

148 *See id.* at 571.

149 *See id.* at 570-71.

150 *Id.* at 570.

151 *Id.* at 574.

152 *Id.* (citing Lopez v. Gonzalez, 549 U.S. 47 (2006)); *see also* Transcript of Oral Argument at 35, *Carachuri-Rosendo*, 560 U.S. 563 (No. 09-60) (Justice Ginsburg commenting that the INA should not be read to require the "absurd result" that noncitizens convicted of minor drug possession crimes be deported and "never, ever darken our doors again").

153 *Carachuri-Rosendo*, 560 U.S. at 573-75 (citing to Lopez v. Gonzalez, 549 U.S. 47 (2006) and Black's Law Dictionary).

The Court then emphasized the appropriateness of a "categorical inquiry" in determining immigration consequences of criminal offenses, noting that the deportation statute requires that the noncitizen be "*convicted* of an aggravated felony."[154] In Carachuri-Rosendo's case, the court record for his second offense — the government-posited recidivist (and thus aggravated) felony conviction — contained "no finding of the fact of his prior drug offense."[155] Furthermore, the Court noted, had Carachuri-Rosendo in fact been prosecuted in federal court as a felony recidivist, he would have been entitled to "mandatory notice and process requirements," as well as an opportunity to contest the validity of the predicate conviction.[156] The government argued these procedural protections were "meaningless," or in any event could be satisfied with comparable procedures in immigration court (for example, with an opportunity to contest the earlier conviction). As it had done in *Padilla*, however, the Court took a realistic view of the limited procedural protections afforded in deportation proceedings, rejecting these arguments.[157]

Carachuri-Rosendo revealed the Court again focusing on the need to preserve prosecutorial discretion in the conviction-to-removal pipeline. The federal procedural prerequisites, Justice Stevens emphasized, allow prosecutors to choose, in the exercise of discretion, whether to seek a recidivist enhancement.[158] Many state codes afford state prosecutors similar discretion.[159] Allowing immigration judges to apply their own recidivist enhancements, Justice Stevens found, "would denigrate the independent judgment of state prosecutors."[160] Indeed, as the Court observed, in Carachuri-Rosendo's own criminal case, "the prosecutor specifically elected to '[a]bandon' a recidivist enhancement under state law."[161] One can only speculate on the prosecutor's motives for doing so, but the Court's ruling ensured that such actions by government attorneys will impact the ensuing immigration proceedings. The Court's analysis means that criminal

154 *Id.* at 576 (emphasis in original) (quotation marks and citation omitted); *id.* at 580.

155 *Id.* at 576.

156 *Id.* at 578.

157 *See id.* at 578-80.

158 *See id.* at 579.

159 *See id.*

160 *Id.* at 579-80; *see also* Traum, *supra* note 126, at 529 ("The prosecutor's decision to pursue a recidivist enhancement, the Court explained, is equivalent to a charging decision, i.e., it is not automatic but a calculated choice by the prosecutor, which must be afforded deference.").

161 *Carachuri-Rosendo*, 560 U.S. at 579-80.

court outcomes of this sort will have predictable immigration consequences, including the preservation of narrow opportunities for discretionary relief.

The Court took much the same approach in *Moncrieffe v. Holder*.[162] Adrian Moncrieffe, a lawful permanent resident with two U.S. citizen children, "came to the United States legally in 1984, when he was three."[163] In 2007, Moncrieffe was stopped while driving in Georgia and arrested for possessing 1.3 grams of marijuana (about two or three cigarettes' worth).[164] He later pleaded guilty as first-time offender to possession of marijuana with intent to distribute.[165] ICE asserted that Moncrieffe's conviction[166] triggered the "illicit trafficking" aggravated felony ground of removal.[167] The immigration judge agreed, and Moncrieffe's order of deportation was upheld by the Board of Immigration Appeals ("BIA") and the Fifth Circuit.[168]

The Court rejected the government's position, with seven Justices in the majority, thus opening the door for a discretionary judgment by an immigration judge about the justifiability of Moncrieffe's deportation. The Court found that Moncrieffe's state conviction did not adequately map onto a federal offense constituting an aggravated felony. Justice Sotomayor's opinion for the majority emphasized, with even more clarity than the Court had provided in prior cases, the categorical analysis that should be employed to determine the immigration consequences of criminal convictions. To trigger deportation under this approach, a state offense must be a "categorical match" with the relevant federal offense, and a "state offense is a categorical match with a generic federal offense only if a conviction of the state offense

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162 Moncrieffe v. Holder, 133 S. Ct. 1678 (2013).

163 *Id.* at 1683; *see also* Brief for Petitioner at 4, *Moncrieffe*, 133 S. Ct. 1678 (No. 11-702) (discussing Moncrieffe's life in the United States).

164 *Moncrieffe*, 133 S. Ct. at 1683. For an argument that Moncrieffe was racially profiled, *see* Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 MICH. J.L. REFORM 967, 993-96 (2015).

165 *Moncrieffe*, 133 S. Ct. at 1683; *see also* GA. CODE ANN. § 16-13-30(j)(1) (2007) (providing the statute under which Moncrieffe was charged).

166 Moncrieffe's status as a first-time offender meant that the court withheld entering a conviction or imposing jail time, with the result that if Moncrieffe successfully completed a five-year probationary period his charge would be expunged altogether. *See* GA. CODE ANN. § 42-8-60(a) (1997). However, the INA requires such dispositions continue to be treated as convictions for purposes of deportation consequences. *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 675-76.

167 *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(43)(B) (2012).

168 *See* Moncrieffe v. Holder, 662 F.3d 387, 389-90 (5th Cir. 2011), *rev'd and remanded*, 133 S. Ct. 1678 (2013).

necessarily involved . . . facts equating to the generic federal offense."[169] The noncitizen's actual conduct, the Court explained, "is quite irrelevant" to the categorical approach.[170] Instead, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense."[171] Put simply, if the state statute criminalizes conduct that is broader than the generic federal offense referenced in the INA, there is a categorically insufficient match between the offenses to warrant imposition of the relevant removal ground.

Under federal law, possession of marijuana with intent to distribute constitutes a felony, punishable by five years imprisonment, except that possession with intent to distribute only a small amount of marijuana for no remuneration is punishable only as a misdemeanor.[172] In *Moncrieffe*, the government had argued that this exception did not serve to define the elements of the federal offense, but rather operated only as a mitigating sentencing factor.[173] Indeed, as a practical matter it seems that defendants prosecuted under the marijuana distribution statute in federal criminal court bear the burden to prove to the sentencing judge that the misdemeanor sentencing exception should apply.[174] The government argued that a similar approach could be followed in immigration proceedings, with state distribution convictions treated by default as aggravated felonies unless the noncitizen can prove the mitigating factors to the immigration judge.[175]

The Court found the government's approach would cast the deportation net too wide, subjecting noncitizens whose conduct was not egregious to a mandatory removal category.[176] Some state-law marijuana distribution convictions would unambiguously correspond only with federal misdemeanors, involving just a small amount of marijuana and no remuneration. The Court found untenable the

[169] *Moncrieffe*, 133 S. Ct. at 1680 (internal quotation marks and alteration marks omitted).

[170] *Id.* at 1684 (internal quotation marks omitted).

[171] *Id.* (internal quotation marks and alteration marks omitted).

[172] *See id.* at 1685-86 (discussing 21 U.S.C. §§ 841(b) and 812(c)).

[173] *See id.* at 1687; *see also id.* at 1698 (Alito, J., dissenting) ("As the Court notes, every Court of Appeals to consider the question has held that § 841(a) is the default offense and that § 841(b)(4) is only a mitigating sentencing guideline.").

[174] *See id.* at 1687-88 (majority opinion).

[175] *See id.* at 1690.

[176] *See id.* at 1689 (discussing a New York statute criminalizing only the distribution of a small amount of marijuana for remuneration).

government's proposed "minitrial" approach to mitigation. In doing so, the majority relied in part on the statutory language, but it also evinced a functional, real-world understanding of the deficiencies of immigration court procedures. The Court emphasized the unfairness of asking noncitizens to "locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention."[177] The Court's insistence on a strict categorical approach in *Moncrieffe* thus not only promoted efficiency and predictability, but also took account of fairness concerns that confront individuals targeted for deportation.[178]

Notably, the Court concluded its opinion in *Moncrieffe* by chiding the Government for its overzealous approach to the criminal deportation provisions:

> This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the commonsense conception" of these terms. [179]

Justice Sotomayor's message was clear: the Court believes the executive's approach to the removal of LPRs with minor criminal history has been unduly aggressive.[180]

In *Mellouli v. Lynch*,[181] decided in 2015, the Court once again rejected the government's scorched-earth approach to seeking the deportation of LPRs with minor drug crimes. Following an arrest for

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[177] *See id.* at 1690. Noncitizens presumably would need to present witnesses to testify that no cash changed hands when the drug was distributed, as lack of remuneration would make the offense punishable as a federal misdemeanor.

[178] *Cf.* Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032 (2008) ("While it is reasonable to expect noncitizens to be on notice regarding the immigration consequences of the facts necessary to the offense, it is unreasonable to expect noncitizens to be on notice that facts outside the elements of the crime will later be used against them."); *see also* Das, *supra* note 132, at 1727-42 (detailing the benefits of deviating from a categorical analysis approach).

[179] *Moncrieffe*, 133 S. Ct. at 1693 (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 573 (2010)).

[180] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 101 (arguing that *Moncrieffe* and *Carachuri-Rosendo* "demonstrate the Court's reluctance to subject long-term lawful permanent residents of the United States to . . . mandatory removal based on relatively small-time drug convictions").

[181] 135 S. Ct. 1980 (2015).

driving offenses, Moones Mellouli was held in detention and officers discovered four Adderall pills in his sock.[182] As a result, the state charged Mellouli with trafficking contraband in jail.[183] A deal was later struck, and the amended complaint to which Mellouli pleaded guilty charged only the lesser offense of possessing drug paraphernalia — to wit, a sock — and did not identify the substance that the officers had seized.[184] Nevertheless, ICE pursued Mellouli's removal, predicated on the controlled substance ground, and in fact deported him.[185] Although Mellouli had been lawfully present in the United States since 2004 and had established significant ties in his community,[186] he was ineligible to seek discretionary cancellation of removal because he had not accrued sufficient continuous presence in lawful status at the time of his arrest and conviction.[187]

In a 7–2 decision authored by Justice Ginsburg, the Court held that Mellouli's drug paraphernalia conviction was not a removable offense. First, the Court noted that federal law does not criminalize simple possession of drug paraphernalia.[188] In addition, federal law defines drug paraphernalia, for purposes of non-possessory crimes such as production or trafficking, as "any 'equipment, product, or material' which is 'primarily *intended or designed for use*' in connection with various drug-related activities," in contrast to "common household or ready-to-wear items like socks."[189] Justice Ginsburg also observed that in 19 states Mellouli's conduct would not even have been deemed a criminal offense.[190]

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[182] *See id.* at 1985.

[183] *Id.*

[184] *See id.*

[185] *See id.*

[186] *See id.* at 1984-85 (noting that Mellouli entered the U.S. on a student visa in 2004, earned undergraduate and graduate degrees with distinction, taught mathematics at University of Missouri-Columbia, became an LPR in 2011, and is engaged to a U.S. citizen).

[187] *See* Immigration and Nationality Act (INA), 8 U.S.C. §§ 1229b(a), (d) (2012) (requiring, *inter alia*, that noncitizens seeking cancellation of removal have five years in LPR status and seven years continuous residence after lawful admission, and specifying that initiation of removal proceedings or commission of a removable criminal offense will stop the accrual of time for purposes of establishing presence or residence).

[188] *Mellouli*, 135 S. Ct. at 1985.

[189] *Id.*

[190] *See id.* ("At most, it is a low-level infraction, often not attended by a right to counsel.").

Once again underscoring the necessity of a categorical approach to analyzing the immigration consequences of criminal convictions,[191] the Court noted that the INA's controlled-substance ground of removal applies only to noncitizens "convicted of a violation of . . . any law or regulation . . . relating to a controlled substance (as defined in section 802 of Title 21)."[192] Immigration officials' theory for Mellouli's deportability was that "a paraphernalia conviction 'relates to' any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used."[193] The Court, however, concluded that this theory of deportability "finds no home" in the statutory text and "leads to consequences Congress could not have intended."[194] In particular, the Court was troubled by the "anomalous result" that minor paraphernalia offenses could trigger removal more easily than offenses based on the actual possession or distribution of drugs, since those offenses support removal only if they involve a federally controlled substance.[195]

The Court also rejected an alternative rationale urged by the government to support Mellouli's removability, which Justice Thomas's dissenting opinion (joined by Justice Alito) largely endorsed.[196] The government argued that because there is "substantial[] overlap" between Kansas's drug schedule and the federal schedules, the state statute could reasonably be construed to be "related to" federally controlled drugs.[197] The Court, however, found this construction of the statute unacceptable, because it would trigger deportation based on state convictions even where no federally controlled offense was involved.[198] Justice Ginsburg hammered on the

191 *See id.* at 1985-87.

192 *Id.* at 1981-82; *see* 8 U.S.C. § 1227(a)(2)(B)(i).

193 *Mellouli*, 135 S. Ct. at 1982 (quoting and citing Martinez Espinoza, 25 I.&N. Dec. 118 (2009)). As the Eighth Circuit put it, Mellouli's conviction "'relates to' a federally controlled substance because it is a crime . . . 'associated with the drug trade in general.'" *Id.* at 1988-89.

194 *See id.* at 1989 (citing Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013)).

195 *See id.* ("The incongruous upshot is that an alien is not removable for possessing a substance controlled only under Kansas law, but he is removable for using a sock to contain that substance.").

196 *Id.*; *see also id.* at 1991-93 (Thomas, J., dissenting). For Justice Thomas, the "relating to" language in the removal statute should be interpreted broadly, and "faithfully applying that text means that an alien may be deported for committing an offense that does not involve a federally controlled substance." *Id.* at 1991-95.

197 *Id.* at 1989 (majority opinion).

198 *See id.* at 1990 (observing that "the Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions, like Mellouli's, in which '[no] controlled substance (as defined in [§ 802])' figures as an

need for categorical analysis, explaining that drug-crime-based removals require "a direct link between an alien's crime of conviction and a particular federally controlled drug."[199] The government's approach would break that link, sweeping in offenses with only "some general relation" to federally controlled substances.[200]

Notably, Justice Ginsburg's opinion for the majority recognized, with apparent approval, Professor Jennifer Koh's observation that the categorical approach enables noncitizens "to enter 'safe harbor' guilty pleas" that avoid immigration sanctions.[201] Indeed, Justice Ginsburg conjectured, Mellouli's own plea may have involved just such an effort, in light of the deal struck and the amended complaint's omission of the nature of the discovered pills in Mellouli's sock.[202] As it had done in *Padilla*, then, the Court in *Mellouli* again endorsed the appropriateness of plea-bargain deals that help noncitizens avoid removal when significant equities support their continued residence in the United States.[203] Moreover, in *Mellouli* the Court went a step further than it had in the earlier criminal removal cases, employing categorical analysis to reach a result that would completely avert the possibility that Mr. Mellouli would be deported on the basis of the conviction at issue, rather than merely preserve the possibility of back-end equitable relief.

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Mellouli and the Court's other recent crime-based-deportation rulings work hand-in-glove with *Padilla* to inject considerations of individual fairness into the deportation process. *Padilla* pushes defense attorneys to seek safe harbors for their noncitizen clients, and prosecutors to weigh immigration-law consequences in exercising their discretion to strike individualized plea deals. At the same time, decisions like *Mellouli* help insulate criminal court deals against the federal government's indiscriminate approach with respect to noncitizens with criminal history. In similar fashion, decisions such as

element of the offense").

199 *See id.*

200 *Id.*

201 *See id.* at 1987 (quoting and citing Koh, *supra* note 131, at 295-310).

202 *Id.* at 1987 n.5.

203 *See* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense — in Vartelas's case, *e.g.*, possession of counterfeit securities . . . .").

Carachuri-Rosendo and *Moncrieffe* broaden opportunities for plea agreements that at least enable the defendant to seek discretionary relief from removal, notwithstanding Congress's efforts to rein in the availability of such relief. Finally, strict and consistent application of the Court's categorical approach also makes it possible for defense counsel to provide clear and accurate advice about immigration consequences in criminal proceedings.[204]

It must be acknowledged that the Court has recently made a concerted effort to implement the categorical approach more strictly in the sentencing context as well.[205] But that fact does not diminish the significance of the case law discussed in this Part for the deportation system, and it certainly was not inevitable that the Court would align its analysis of determining the consequences of prior convictions in both systems.[206]

Before turning to the next group of immigration decisions, I should clarify that although the Court has generally required categorical analysis as a means of injecting equity into the removal system, it has departed from the strict categorical approach in a few cases. Thus, in *Nijhawan v. Holder*, the Court determined that the monetary-loss portion of aggravated felony provision concerning "fraud or deceit in which the loss to the victim or victims exceeds $10,000" required inquiry into the specific circumstances surrounding an offender's commission of the crime, regardless of whether the amount of loss was a necessary element of the underlying conviction.[207] As the Court later

[204] *See* Das, *supra* note 132, at 1745 (arguing that the watering down of the categorical approach "creates tensions within the criminal justice system, disrupting defense counsel's ability to advise immigrant clients meaningfully and complicating the ability of all the actors in the system who want to seek more appropriate outcomes through plea-bargaining"); Koh, *supra* note 131, at 298 ("The fairness concerns associated with the categorical approach take on particular urgency in light of the Supreme Court's decision in *Padilla v. Kentucky*, which affirmed the ethical duty of criminal defense counsel to accurately advise noncitizen defendants of the immigration consequences following a guilty plea.").

[205] *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243 (2016) (reaffirming and clarifying the use of the categorical approach to determine the sentencing consequences of a prior conviction); Descamps v. United States, 133 S. Ct. 2276 (2013) (same); Shepard v. United States, 544 U.S. 13 (2005) (same).

[206] *See, e.g.*, Silva-Trevino, 24 I.&N. Dec. 687, 704 (A.G. 2008) (opinion by Attorney General Mukasey directing immigration judges to consider "any additional evidence" where the categorical approach fails to show that a particular conviction constitutes a crime involving moral turpitude), *vacated*, Silva-Trevino, 26 I.&N. Dec. 550 (A.G. 2015); Das, *supra* note 132 (pointing out the immigration agency's divergence from the categorical approach in immigration law and the courts' failure to adequately correct that path).

[207] *See* Nijhawan v. Holder, 557 U.S. 29, 38 (2009).

noted in *Mellouli*, however, the particular statutory ground at issue in *Nijhawan* was "atypical."[208] If strict categorical analysis had been employed, the relevant deportation provisions would have had extremely limited and inconsistent application, thwarting Congress's intent.

More recently, in *Torres v. Lynch*, a five-Justice majority of the Court held that, despite its recent emphasis on a strict categorical approach, state offenses need not contain an interstate commerce element in order to trigger the various aggravated felony removal grounds that are defined in the immigration code by way of cross-reference to federal offenses in which such jurisdictional element is required.[209] Torres was convicted of a state arson offense that did not require any connection to interstate commerce, but which otherwise satisfied the elements of a federal arson and explosives statute that the INA incorporates as an aggravated felony ground.[210]

Although the Court upheld the government's position, and softened the categorical approach with respect to the jurisdictional element, the decision does not break from the general thrust of the Court's recent deportation jurisprudence and its focus on proportionality. Indeed, Justice Kagan's opinion for the majority took pains to explain why a rule that does not require state crimes to contain the interstate commerce element contained in the corresponding federal offenses that define many of the aggravated felony categories will result in the best overall match between serious noncitizen offenders and banishment.[211] Were Torres's arguments to prevail, the Court found, noncitizens who commit various egregious crimes (e.g., child pornography offenses) would not be automatically removable as aggravated felons, while others who engage in much more minor crimes (e.g., operating an unlawful gambling business) still would. And those anomalous results would follow merely from whether a state chooses to create an interstate commerce element for the crime.

Justice Sotomayor's dissenting opinion, joined by Justices Thomas and Breyer, would have interpreted the INA in a way that casts the

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[208] *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1986 n.3.

[209] *See* Torres v. Lynch, 136 S. Ct. 1619, 1634 (2016).

[210] *See id.* at 1623-24.

[211] *See id.* at 1627-30. To the extent that some applications of the aggravated felony categories triggered by state offenses lacking an interstate commerce element would sweep too broadly in individual cases, Chief Justice Roberts suggested at oral argument that a permissible solution would be for the attorney general to exercise discretion and "not . . . subject the alien to removal in the first place . . . ." Transcript of Oral Argument at 44-45, Torres v. Lynch, 136 S. Ct. 1619 (2015) (No. 14-1096), 2015 WL 9919328.

reach of some of the aggravated felony grounds more narrowly, by strictly requiring nonfederal statutes to contain an interstate commerce element if the federal statute referred to in the applicable deportation ground also contains such an element.[212] Justice Sotomayor emphasized the fact that convictions deemed aggravated felonies deprive immigration judges of the authority to set aside removal where, on balance, an individual's positive equities and ties outweigh the sanction of deportation.[213] Torres, himself, she noted, appeared to otherwise be eligible for cancellation of removal. The dissenting opinion recognized that strict application of the categorical approach would allow some serious offenders to evade particular removal grounds. Justice Sotomayor pointed out, however, that such risk is mitigated because many such convictions would also fall into the generic "crime of violence" aggravated felony removal category, which does not contain the jurisdictional interstate-commerce hook, or within other removal categories for which discretionary relief would be possible but not likely granted.[214]

At the end of the day, the *Torres* majority was uncomfortable with an interpretation of the aggravated felony provision that would have made it more difficult for the government to remove some very serious noncitizen offenders. The dissenters, in contrast, would have drawn the line in a different place, preserving more possibilities for immigration judges to consider individual equities and circumstances in determining the appropriateness of deportation. The take-away is that both the majority and dissenting opinions in *Torres* reflect the Justices' continuing concern with proportionality in the operation of immigration laws, including for noncitizens with criminal histories. Importantly, though, *Torres* shows that the Court's proportionality concerns are not necessarily a one-way ratchet. While the Court's jurisprudence in this area largely works to increase structural possibilities for noncitizens to avoid removal, the equities add up differently, at least for a majority of the Justices, when it comes to the deportation of egregious criminal offenders.

C. Arbitrary and Capricious Charging Discretion

Judulang v. Holder,[215] handed down in 2011, has received less academic scrutiny than other recent deportation decisions. Although

[212] *See Torres*, 136 S. Ct. at 1634 (Sotomayor, J., dissenting).

[213] *See id.* at 1634-35.

[214] *See id.* at 1636-38.

[215] Judulang v. Holder, 132 S. Ct. 476 (2011).

the case involved an unusual set of facts, some aspects of the Court's decision may prove to be influential.

Like *St. Cyr*, the *Judulang* case concerned INA section 212(c), the discretionary relief provision repealed in 1996. To understand the Court's ruling, one must know something about the background statutory structure. Section 212(c) was located in the *inadmissibility* section of the INA, and therefore did not clearly authorize immigration judges to set aside *deportation* grounds for equitable reasons. After much litigation, primarily involving challenges on equal protection grounds, the BIA adopted a policy of extending 212(c) discretionary relief to noncitizens facing deportation on criminal grounds, but only if the deportation ground with which they were charged had a comparable inadmissibility ground in the INA.[216] The vast majority of circuits then upheld this "comparable grounds" approach as a reasonable interpretation of the statute.[217]

In *Judulang*, a unanimous Court found this agency practice to be an "arbitrary and capricious" restriction on eligibility for relief from removal, thereby violating the Administrative Procedures Act.[218] The Court emphasized that agency practices with respect to a noncitizen's eligibility for discretionary relief must be tied to "the purposes of the immigration laws or the appropriate operation of the immigration system."[219] Justice Kagan, who authored the majority decision, never explicitly defined these "purposes" or what is meant by the "appropriate operation" of the deportation system. Nevertheless, the opinion evidences the Court's clear discomfort with a deportation system that allows agency officials to exercise prosecutorial discretion without regard to the "alien's fitness to remain in the country."[220]

Throughout the opinion, the Court focused on the need to connect agency policies regarding criminal noncitizens' eligibility for

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[216] *See id.* at 480-82.

[217] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 91-93 (describing *Judulang* as "a stinging rebuke of the BIA's reasoning and the U.S. government's defense of it").

[218] *Judulang*, 132 S. Ct. at 485, 487; *see also* Jeffrey D. Stein, *Delineating Discretion: How* Judulang *Limits Executive Immigration Policy-Making Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 48 (2012) (contending that *Judulang* marked a significant doctrinal move "from a weaker, process-oriented APA review of immigration policy to a more rigorous and independent review of the policy's merits").

[219] *Judulang*, 132 S. Ct. at 485; *see also id.* at 487 (observing that the agency's comparable grounds approach to 212(c) relief has "no connection to the goals of the deportation process or the rational operation of the immigration laws").

[220] *Id.* at 484-85.

discretionary relief to the actual merits of deportation in individual cases. Justice Kagan opined that the agency's comparable-grounds approach "does not rest on any factors relevant to whether an alien . . . *should* be deported"[221] and "has nothing to do with whether a deportable alien . . . *merits* the ability to seek a waiver."[222] In fact, the agency's methodology for determining whether a noncitizen may qualify for relief "is as extraneous to the merits of the case as a coin flip would be."[223] This, the Court found, is because the correspondence (or not) of a charged deportation ground with a ground of inadmissibility is arbitrary. The Court explained that the government's approach to deciding who may seek discretionary relief must take into account "the alien's prior offense or his other attributes and circumstances."[224] The ruling thus again signaled the importance of normative balancing and proportionality in the agency's implementation of the deportation statute.

The Court appeared particularly troubled by the tendency of this agency scheme to allow discretionary charging decisions by individual immigration prosecutors to bring about arbitrary or capricious results.[225] As Justice Kagan explained, "underneath this layer of arbitrariness lies yet another, because the outcome of the Board's comparable-grounds analysis itself may rest on the happenstance of an immigration official's charging decision."[226] This possibility obtains because a noncitizen's conviction often may fall within several of the INA's deportation grounds. Accordingly, front-line ICE attorneys have significant flexibility in determining which of several deportation grounds to pursue, much like the discretion a prosecutor enjoys when determining which criminal charges to levy against particular defendants.

Coupled with the Board's comparable-grounds approach to 212(c) relief, this unencumbered discretion allowed the agency's trial attorneys to foreclose, simply through optional charging decisions, any possibility of relief. In Judulang's case, for example, his conviction

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[221] *Id.* at 487 (emphasis added); *see also id.* at 485 ("Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant statutory comparison between statutory provisions.").

[222] *Id.* at 485 (emphasis added).

[223] *See id.* at 485-86.

[224] *See id.* at 485.

[225] I briefly highlighted this aspect of *Judulang* in previous work. *See* Jason A. Cade, *Deporting the Pardoned*, 46 UC DAVIS L. REV. 355, 416 (2012) [hereinafter *Deporting the Pardoned*].

[226] *Judulang*, 132 S. Ct. at 486.

for voluntary manslaughter fell within both the "crime involving moral turpitude" deportation ground and the "crime of violence" aggravated felony deportation ground. Because immigration officials charged him under the latter provision, rather than just the former, he was deemed ineligible for 212(c) discretionary relief under the comparable grounds approach, as there is no ground of inadmissibility that corresponds with the crime of violence aggravated felony category. Justice Kagan highlighted the injustice of hinging a noncitizen's right to remain on an individual immigration prosecutor's charging decision: "An alien appearing before one official may suffer deportation; an identically situated alien appearing before another may gain the right to stay in the country."[227]

Despite the complexity and idiosyncrasy of the particular scheme at issue, the most important take-away from *Judulang* is the Court's willingness to employ arbitrary-and-capricious administrative review to tether the "rational operation of the immigration laws" to a charging scheme that focuses on the "merits of the case."[228] Read broadly, *Judulang* suggests that charging decisions that arbitrarily deprive a noncitizen of any possibility of equitable relief may be subject to judicial scrutiny. It remains to be seen whether the Court, or lower courts, will apply the reasoning of *Judulang* to weigh challenges to other discretionary charging policies in deportation proceedings that affect a noncitizen's ability to present mitigating equities.[229] Such situations do exist. For example, ICE officials have the discretionary authority to choose among alternative removal charges in a way that, as the statute has been interpreted, can render gubernatorial or Presidential pardons either effective or ineffective in the immigration context.[230] Even more commonly, discretionary charging decisions can determine whether non-LPRs are channeled to expedited removal proceedings where they enjoy fewer procedural protections and defenses to removal.[231]

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[227] *Id.*

[228] *Id.* at 485-87.

[229] *Cf.* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489-92 (1999) (rejecting plaintiff's first amendment challenge to selective immigration enforcement).

[230] *See* Cade, *Deporting the Pardoned*, *supra* note 225, at 373-78 (discussing this phenomenon and arguing that *Judulang* might support a challenge to immigration charging decisions that arbitrarily render gubernatorial pardons ineffective).

[231] *See, e.g.*, Stein, *supra* note 218, at 59-74 (discussing this phenomenon and arguing that *Judulang* might facilitate challenges to an ICE officer's decision to put non-LPRs with aggravated felony convictions into administrative expedited removal proceedings, which provide even weaker protections than regular deportation proceedings). On expedited removal generally, see Shoba Sivaprasad Wadhia, *The Rise*

At the least, *Judulang* provides further evidence of the Court's continuing concern about the lack of adjudicative discretion in the deportation system, particularly when the government seeks to constrict even further the already-much-narrowed possibilities for individual balancing that remain in the code.[232]

D. The Second-Look Cases

Another series of recent Supreme Court decisions work toward equitable ends by protecting noncitizens' procedural rights in immigration court. In the face of legislative and executive efforts to restrict noncitizens' ability to obtain judicial review and other means of challenging removal orders,[233] the Court has issued a number of decisions interpreting the statute to preserve noncitizens' ability to reopen proceedings. These second-look cases thus help safeguard opportunities for noncitizens to present claims for relief from removal after the completion of their administrative immigration proceedings.[234]

Consider 2008's *Dada v. Mukasey*.[235] An immigration judge granted Samson Dada voluntary departure, a statutory benefit allowing him to avoid the consequences of a deportation order but requiring him to depart the country to Nigeria within thirty days.[236] Near the end of that period, Dada filed a timely motion to reopen his removal proceedings in order to present evidence that he was married to a U.S. citizen, thus providing a basis for adjustment of status.[237] Dada, however, found himself in a bind. The motion to reopen would take

of Speed Deportation and the Role of Discretion, 5 COLUM. J. RACE & L. 1 (2015).

[232] *But see* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 403-07 (2013) (arguing that the Court resolved *Judulang* on administrative law principles in order to avoid having to recognize constitutional rights of noncitizens).

[233] *See* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997); Traum, *supra* note 126, at 516 & n.148.

[234] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 77 ("Noncitizens subject to removal from the United States regularly file motions to reopen, seeking among other things, to present new evidence in support of claims for relief from removal.").

[235] Dada v. Mukasey, 554 U.S. 1 (2008).

[236] Although the statute provides that persons granted voluntary departure at the conclusion of removal proceedings may be granted up to 60 days to leave the country, *see* 8 U.S.C. § 1229c(b)(2) (2012), the immigration judge in Dada's deportation case gave him 30 days. *Dada*, 554 U.S. at 6.

[237] *See Dada*, 554 U.S. at 6-7.

time to adjudicate, but if Dada failed to comply with the time limit for voluntary departure he would become subject to significant statutory penalties, including ineligibility to seek adjustment of status for ten years.[238] At the same time, if Dada complied with the departure order and left the country in a timely fashion, he would become ineligible to pursue his motion to reopen.[239]

Rejecting the government's view that Dada's statutory right to reopen is constrained by the voluntary departure scheme,[240] the Court held that noncitizens must be permitted to unilaterally withdraw from a voluntary departure order before the end of the authorized departure period in order to pursue a motion to reopen.[241] In reaching this resolution, the majority emphasized the critical importance and long pedigree of motions to reopen in immigration cases.[242] The Court described such motions as an "important safeguard," the purpose of which "is to ensure a proper and lawful disposition."[243] Driving the Court's statutory interpretation in *Dada* was its underlying concern that without a solution preserving the ability to reopen proceedings, noncitizens might be precluded from establishing their eligibility for adjustment of status or other statutory rights to remain in the United States lawfully.[244]

Also important to the Court's rationale were the practical limitations that noncitizens in Dada's situation face. As the Court explained, the time periods permitted for voluntary departure will frequently expire before the agency renders a decision on the noncitizen's motion to

238 *See id.* at 5.

239 *See id.*; *see also* 8 C.F.R § 1003.2(d) (2016).

240 *See Dada*, 554 U.S. at 15 (noting the government's argument that "by requesting and obtaining permission to voluntarily depart, the alien knowingly surrenders the opportunity to seek reopening"); *see also id.* at 23-25 (Scalia, J., dissenting) (arguing that Dada "accepted the above described deal, but now . . . wants to back out").

241 *See id.* at 21 (majority opinion).

242 *See, e.g.*, *id.* at 12 (explaining that motions to reopen are a form of "procedural relief" used by federal judges in immigration cases at least as far back as 1916 and "later codified by federal statute"); *id.* at 12-13 (suggesting judicial intervention to reopen proceedings may not be warranted where noncitizens are not given a "full opportunity to testify and to present all witnesses and documentary evidence" (quoting and citing Wong Shong Been v. Proctor, 79 F.2d 881, 883 (9th Cir. 1935))); *id.* at 18 (explaining the motion to reopen as an "important safeguard"); *id.* at 21 (holding that an alien "must be permitted to withdraw . . . a voluntary departure request" to protect the right to pursue a motion to reopen).

243 *Id.* at 18; *see also id.* at 21 ("We hold that, to safeguard the right to pursue a motion to reopen for voluntary departure recipients, the alien must be permitted to withdraw, unilaterally, a voluntary departure request . . . .").

244 *See id.* at 18, 22.

reopen, due to a massive agency backlog.[245] Therefore, the possibility that a noncitizen's motion to reopen would be adjudicated before the end of the voluntary departure period turns on a matter of "pure happenstance."[246] Moreover, the Court candidly hoped that "[a]llowing aliens to withdraw from their voluntary departure agreements," would establish a "greater probability that their motions to reopen will be considered."[247] Finally, the Court found the statute and legislative history insufficiently clear to permit infringement of this vital procedural safeguard.[248] *Dada* thus protected a noncitizen's opportunity to present a defense to removal even after having accepted an order of voluntary departure.

Two years later, *Kucana v. Holder* allowed the Court to further elaborate on the importance of allowing noncitizens adequate opportunity to present a defense to deportation. One of IIRIRA's restrictions on judicial review provides that no federal court shall have jurisdiction to scrutinize discretionary agency actions.[249] *Kucana* presented the question whether federal courts retain jurisdiction to review denials of noncitizens' motions to reopen removal proceedings where the Attorney General — rather than Congress — has committed such determinations to the discretion of the agency.[250] Justice Ginsburg's majority opinion, joined by seven Justices, found that Congress intended to insulate from judicial review only agency decisions made discretionary by statute, in contrast to those so specified by administrative regulations.[251]

Kucana applied for asylum in the late 1990s but was ordered removed when he failed to appear for his merits hearing.[252] He remained in the country, however, and moved to reopen his removal proceedings in 2006, alleging that political conditions in his native

[245] *See id.* at 17 (noting that many decisions are pending more than a year before the BIA).

[246] *Id.* at 17.

[247] *Id.* at 22; *see also id.* at 30 (Scalia, J., dissenting) ("What does not appear from the Court's opinion, however, is the source of the Court's authority to increase that probability [that motions to reopen will be considered] in flat contradiction to the text of the statute.").

[248] *See id.* at 14-15 (majority opinion).

[249] *See* Immigration and Nationalization Act (INA), 8 U.S.C. § 1252(a)(2)(B) (2012).

[250] *See* Kucana v. Holder, 558 U.S. 233, 237 (2010).

[251] *See id.* at 237. Justice Alito concurred in the Court's judgment but would have resolved the case on narrower grounds, *id.* at 253 (Alito, J., concurring).

[252] *See id.* at 239-40 (majority opinion).

Albania had materially worsened.[253] The BIA declined to reopen. Departing from the conclusion of at least six other Courts of Appeals,[254] the Seventh Circuit panel declined to take jurisdiction of Kucana's case, holding that the INA bars judicial review of discretionary administrative decisions, whether so designated by statute or regulation.[255]

The Court reversed, invoking the "longstanding exercise of judicial review of administrative rulings on reopening motions."[256] A motion to reopen, the Court emphasized, is an important "procedural device serving to ensure 'that aliens [a]re getting a fair chance to have their claims heard.'"[257] The Court found insufficient indication in the text or structure of the INA that Congress intended to eliminate judicial oversight of such a critical mechanism for equity — especially in cases like Kucana's, where the underlying claim for relief (asylum) remains reviewable.[258] As the Court explained, the plain language of IIRIRA expressly prohibits judicial review of the Attorney General's discretionary judgments, but does not mention discretionary decisions delegated by regulation to immigration agency adjudicators.[259]

The Court was also troubled that the Seventh Circuit's interpretation would allow the executive agency "to shelter its own decisions from abuse-of-discretion appellate court review simply by issuing a regulation declaring those decisions 'discretionary.'"[260] This result would be an "extraordinary delegation" of authority, raising separation of powers concerns along with the possibility of

253 *See id.* at 240.

254 *See id.* at 240-41 n.7 (collecting cases).

255 *Id.* at 240. The U.S. Solicitor General at the time, Elena Kagan, declined to defend the Seventh Circuit's decision and Professor Amanda Leiter of the Washington College of Law at American University was appointed to defend the lower federal court ruling. *See id.* at 241-42.

256 *Id.* at 237; *see also id.* ("We take account, as well, of the 'presumption favoring interpretation of statutes [to] allow judicial review of administrative action.'" (citation omitted)); *id.* at 242 (observing that agency decisions about reopening deportation proceedings have been judicially scrutinized since "at least 1916" (quoting and citing Dada v. Mukasey, 554 U.S. 1 (2008))); *id.* at 251-52 ("Because the 'presumption favoring interpretations of statutes [to] allow judicial review of administrative action' is 'well-settled,' the Court assumes that 'Congress legislates with knowledge of' the presumption . . . ." (citations omitted)).

257 *Id.* at 248; *see also id.* at 242, 250 (describing motions to reopen as "'important safeguard[s]' intended 'to ensure a proper and lawful disposition' of immigration proceedings" (quoting and citing *Dada*, 554 U.S. 1)).

258 *See id.*

259 *See id.* at 252.

260 *Id.*

unreviewable agency injustices affecting individual noncitizens facing removal.[261] *Kucana* thus continued the Court's efforts to ensure the continued availability of procedural vehicles for presenting defenses and seeking judicial review — mechanisms that took on greater urgency following Congress's changes to the INA in the 1990s.[262]

More recently, *Mata v. Lynch* required the Court to consider another challenge to judicial review of noncitizens' attempt to reopen a removal order.[263] Reyes Mata had entered the U.S. unlawfully. Fifteen years later, he was convicted in state criminal court of assault, put into immigration proceedings, and ordered removed. Mata's attorney filed a notice of appeal with the BIA, but then failed to file a brief stating grounds for overturning the removal order. Not surprisingly, the BIA dismissed the appeal. Mata then obtained new counsel, who filed a motion to reopen his case with the BIA. The government opposed the appeal based on Mata's failure to meet the 90-day statutory deadline for motions to reopen (he was at least 10 days late).

Mata argued that the prior attorney's ineffective assistance in failing to file a brief amounted to an exceptional circumstance excusing the lateness. Although the BIA agreed it had authority to equitably toll the filing period due to ineffective representation, it declined to do so because it discerned no prejudice to Mata's case from the lawyer's deficient assistance. Nor was this a situation, the BIA noted, "that would warrant reopening" through its *sua sponte* authority, because "the power to reopen on our own motion is not meant to be used as a general cure for filing defects."[264]

The Fifth Circuit declined to address the merits of Mata's equitable tolling claim. Instead, it construed that claim as a request for the BIA to review the ineffective assistance of counsel claim on the basis of its *sua sponte* authority. Because circuit precedent established that federal courts lack authority to review the Board's exercise of *sua sponte* power, the Fifth Circuit deemed the relief sought by Mata to be "categorically unavailable."[265]

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[261] *See id.* at 252-53; *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316-17 (2000) (arguing that the judiciary employs nondelegation norms to limit executive rules in certain contexts in part to ensure that restrictions on individual rights are made by the institution with superior democratic legitimacy, namely Congress).

[262] *See* Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 77 (observing that *Kucana* "builds on the Court's line of decisions ensuring the judicial review of removal decisions in the face of increasingly stringent congressional restrictions").

[263] 135 S. Ct. 2150, 2151 (2015).

[264] *Id.* at 2153 (quoting the BIA's decision).

[265] *Id.* at 2155. Amicus appointed to defend the Fifth Circuit's decision also argued

The Court reversed, finding the basis for the BIA's denial of the motion to reopen to be irrelevant to the jurisdictional issue.[266] The Court emphasized that "as we explained in *Kucana*, courts have reviewed those decisions for nearly a hundred years," a tradition that Congress left intact in the INA even as it "curtailed other aspects of courts' jurisdiction over BIA rulings."[267] Thus, *Mata* clarified that federal courts should review motions to reopen even where the agency has dismissed the motion as untimely.

The Court also chastised the Fifth Circuit for its practice of recasting motions to reopen based on equitable tolling as a challenge to the Board's *sua sponte* decision, and then declining to exercise jurisdiction. The Court observed that courts sometimes are permitted to recharacterize filings, but only to "identify[] a route to relief," rather than to "render[] relief impossible."[268] The Court then described the lower court's premise that motions to reopen are not subject to equitable tolling as merely "an assumption."[269] Although disclaiming any opinion about the merits of the equitable tolling claim, Justice Kagan observed that, aside from the Fifth Circuit, "all appellate courts to have addressed the matter have held that the Board may sometimes equitably toll the time limit for an alien's motion to reopen."[270] To the extent that the Fifth Circuit disagrees with every other federal court about the merits of equitable tolling, the Court continued, it should not mask this division through legal gymnastics that clothe the issue in "jurisdictional garb."[271] Justice Kagan suggested that the Court would be interested in resolving this circuit split, and hinted in dicta that a noncitizen's failure to comply with the statutory deadline to file a motion to reopen may well be subject to equitable tolling for reasons such as ineffective assistance of counsel.[272]

A final second-look case to consider here is *Nken v. Holder*,[273] which concerned another restrictive statutory provision not at issue in *Dada*,

that the lower court's approach was justified because "the INA forbids equitable tolling of the 90-day filing period in any case, no matter how exceptional the circumstances." *Id.*

266 Only Justice Thomas dissented. *Id.* at 2150.

267 *Id.* at 2154.

268 *Id.* at 2156.

269 *Id.* at 2155.

270 *Id.* at 2155-56.

271 *Id.* at 2156.

272 *See id.*

273 Nken v. Holder, 556 U.S. 418 (2009).

Kucana, or *Mata*. That statute, enacted as part of Congress's extensive amendments to the code in 1996, provides that "no court shall enjoin the removal of any alien pursuant to a final order" unless the noncitizen can demonstrate by clear and convincing evidence that the order was "prohibited as a matter of law."[274] In a 7–2 decision authored by Chief Justice John Roberts, the Court narrowly read the statutory term "enjoin" to encompass only a noncitizen's request for an actual injunction, as opposed to a request for a judicial stay of the removal order.[275] Accordingly, the Court held, lower courts should apply "the traditional standard" for stays, rather than the INA's much more restrictive threshold.[276]

Notably, the Court's interpretation of the statute's meaning rendered the subsection largely without purpose, because noncitizens seeking judicial review ordinarily will request stays of removal orders rather than injunctions. As the Chief Justice acknowledged, "the exact role of subsection (f)(2)" following the Court's reading was "not easy to explain."[277] Nevertheless, the Court found it necessary to read the clause narrowly in order to preserve noncitizens' opportunities for full consideration of their right to remain, in light of the system's practical limitations on expeditious review by appellate courts.[278] By insisting on the traditional stay factors for noncitizens seeking review, the Court maintained a preference for individual balancing and room for judicial discretion. Those structural preferences enable reviewing courts to directly consider equitable factors when determining whether to stay a challenged removal order.

A normative concern lies beneath the procedural surface of these decisions.[279] Especially when considered together, the second-look cases suggest that the Court is troubled by constrictions of

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[274] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252(f) (2012).

[275] *Nken*, 556 U.S. at 425-26.

[276] *See id.* at 434. The traditional stay factors, the Court observed, are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (internal quotation marks and citation omitted).

[277] *Id.* at 431.

[278] *See id.* at 421, 432-36.

[279] *See* Jenny S. Martinez, *Process and Substance in the "War on Terror*," 108 COLUM. L. REV. 1013, 1018 (2008) (observing that procedural rules often "draw not only upon substantive assumptions about the probability of particular facts but also normative judgments about where we want the risk of error in cases to fall").

noncitizens' opportunity to present a defense against deportation, even after a final order of removal. Some of the cases also evince a concern with the particular harm caused by inadequate assistance of counsel in the removal context. With a robust right to reopen proceedings, the risk that a person will be erroneously deported decreases. On the other hand, a strong opportunity to reopen increases the risk that a person will have the opportunity to remain in the United States in the face of a removal order. Thus, it is notable that the Court's second-look cases take account of the realities of the deportation system and preserve structural opportunities to avoid removal where relief may be available, even in the face of increasing statutory stringency and at some presumptive cost to efficiency and administrative ease for the agency and reviewing courts.[280]

E. Prolonged Detention

A particularly salient feature of the modern deportation system involves immigration officials' sweeping authority to detain noncitizens pursuant to both discretionary and mandatory rules.[281] The Court issued three decisions concerning detention provisions between 2001 and 2005. Despite the proliferation of immigration detention and widespread litigation on this issue in lower federal courts, however, the Court declined to review further challenges to immigration detention for over a decade. Although the Court's two primary decisions in this trio — *Zadvydas v. Davis* and *Demore v. Kim* — created some tension in the law, a critical concurring opinion by Justice Kennedy in *Demore* has proven over time to be highly influential to lower courts tasked with reconciling the two holdings, to the benefit of noncitizens detained while facing removal. This term the Court will finally weigh in on these issues again, in *Jennings v. Rodriguez*,[282] a case that should bring much needed clarity to the procedural rights held by detained noncitizens in ongoing removal proceedings. If the Court upholds the Ninth Circuit's decision,[283]

[280] *Cf.* Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 730 (1975) ("[I]t seems impossible to conceive of a manner of allocating risks of uncertainty without considering substantive preferences."); Martinez, *supra* note 279, at 1019 ("We presume innocence in criminal trials not because we think most defendants are in fact innocent, but because of concerns about limiting government power and a preference for avoiding erroneous convictions even at the cost of erroneous acquittals.").

[281] *See supra* Part I.

[282] 136 S. Ct. 2489 (2016) (granting petition for certiorari).

[283] Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *cert. granted sub nom.*

many more noncitizens will gain the opportunity to secure release from detention, significantly facilitating their ability to raise legal and equitable defenses to deportation.

The discussion begins with *Zadvydas v. Davis*,[284] which was decided during the same term as *St. Cyr*.[285] *Zadvydas* concerned the immigration agency's prolonged detention of former LPRs who had been ordered removed. The INA mandates detention for 90 days after any deportation order in order to effectuate the noncitizen's physical removal from the United States.[286] The statute also provides authority to continue detention of noncitizens not removed within the 90-day period on a discretionary basis.[287] The executive branch interpreted this provision to allow indefinite detention of noncitizens with final orders who could not be removed, for example where no other country was willing to take them.[288] As a result, some noncitizens become "unremovables," confined for years, with no end in sight.[289] *Zadvydas* concerned two such would-be lifers, former-LPRs with criminal histories.[290]

In a majority opinion authored by Justice Breyer, the Court avoided the due process problems raised by indefinite detention of the unremovables by construing the statute to permit continued post-order detention beyond the 90-day period only so long as removal was "reasonably foreseeable." The Court found that post-order detention for six months would not raise constitutional concerns, but held that noncitizens become eligible for release after such period if they can show that there is "no significant likelihood of removal in the reasonably foreseeable future."[291]

Jennings v. Rodriguez, 136 S. Ct. 2489 (2016).

[284] Zadvydas v. Davis, 533 U.S. 678 (2001).

[285] *See supra* Part II.B.

[286] Immigration and Nationality Act (INA), 8 U.S.C. § 1231(a)(2) (2012).

[287] *Id.* § 1231(a)(6).

[288] *See Zadvydas*, 533 U.S. at 689.

[289] *See, e.g.*, Lise Olsen, *Case Tests the Rights of Immigrants Held in U.S. Jails*, CHRISTIAN SCI. MONITOR (May 24, 1999), http://www.csmonitor.com/1999/0524/p2s2.html.

[290] *See Zadvydas*, 533 U.S. at 684-86 (discussing facts of the two plaintiffs in *Zadvydas* who could not be removed, one of whom was stateless and the other of whom was a citizen of a country lacking a repatriation treaty with the United States, and whom the government had been detaining for years).

[291] *Id.* at 701. The Court rejected the executive's assertion that continued detention was necessary to ensure the noncitizens did not endanger the community or fail to appear at future removal proceedings. *Id.* at 690-91. The Court arrived at the six-month presumptive limit for the reasonableness of post-deportation-order detention by looking to earlier provisions of the INA, which permitted (but did not require)

Whether *Zadvydas* should be considered a victory for liberty interests depends upon one's perspective. Viewed through the lens of criminal or civil detention generally, the Court's willingness to insulate the government from judicial scrutiny of the legality of detention for at least six months would seem shocking.[292] Moreover, even after that point, a rule placing the burden on the detainee to show that removal is not reasonably foreseeable is out of step with mainstream norms governing confinement. Normally, it is the responsibility of the government to justify continuing detention.[293] Thus, as others have observed, *Zadvydas* permits at least half a year of incarceration without requiring the government to make any individualized showing of dangerousness or flight risk, a rule that flies in the face of long-established due process law protecting fundamental liberty interests.[294]

In the context of the history of immigration law in the United States, however, *Zadvydas*'s interpretation of the statute had a progressive cast. The Court stepped away from a long line of decisions granting the government virtually limitless authority to detain noncitizens who have been determined to have no legal claim to enter or remain in the United States. *Knauff v. Shaughnessy*, for example, permitted the government to indefinitely detain the immigrating spouse of a U.S. citizen, who by that time had been held for three years at Ellis

post-deportation-order detention for up to 6 months. *See id.* at 697-98 (citing Immigration and Nationality Act of 1952, § 242(c), 66 Stat. 210, 8 U.S.C. § 1252(c), (d) (1982 ed.)). The Court also found detention limits in similar contexts to be persuasive. *See id.* at 700-01 (citing Cheff v. Schnackenberg, 384 U.S. 373 (1966) (plurality opinion) (extending right to jury for cases with sentences of six months or greater), and County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (recognizing that a probable cause hearing provided within 48 hours of arrest is presumed reasonable)).

[292] *See* Foucha v. Louisiana, 504 U.S. 71, 83 (1992) (holding that a Louisiana statute which permitted indefinite detention of mentally ill individual until detainee could prove that he is no longer dangerous was an unconstitutional violation of due process); United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

[293] *See generally* Florida v. Royer, 460 U.S. 491, 500 (1995) ("The scope of the detention must be carefully tailored to its underlying justification. . . . It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.").

[294] *See* Anello, *supra* note 24, at 376-83; Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATLANTIC Q. 621 (2014); Cesar Garcia Hernandez, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOWARD L.J. 869, 878-79, 881-82 (2014) [hereinafter *Invisible Spaces*].

Island.[295] The Court proclaimed: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[296] A few years later, *Shaughnessy v. Mezei* characterized the government's indefinite detention of a returning noncitizen deemed inadmissible on undisclosed national security grounds as "temporary harborage" and "an act of legislative grace."[297] Therefore, the Court held, such detention was not susceptible to judicial review, no matter how long the duration, and regardless of the fact that Mezei had lived in the United States lawfully for many years before being excluded upon his return from a trip abroad. In simple terms, the majority did not think Mezei had any statutory or constitutional rights.[298]

Justice Scalia dissented in *Zadvydas*, arguing that *Knauff* and *Mezei* required the Court to reject the unremovables' challenge to their detention. Justice Scalia characterized the challenge in *Zadvydas* as "a claimed right of release into this country by an individual who concededly has no legal right to be here."[299] Noting that *Mezei* "upheld potentially indefinite detention of such an inadmissible alien whom the Government was unable to return anywhere else," Scalia found nothing to distinguish "an alien under a valid and final order of removal — which has totally extinguished whatever right to presence in this country he possessed."[300] In short, Justice Scalia would have found former-LPRs like those in *Zadvydas* to possess no constitutional right to challenge their continued detention. In a separate dissenting opinion, Justice Kennedy acknowledged the unremovables' "substantial" right to be free of arbitrary and capricious detention, but found that existing administrative practices satisfied procedural due process.[301]

Following *Zadvydas*, immigration authorities applied the Court's six-month rule to all noncitizens ordered deported after being apprehended inside the United States, whether or not they had ever been lawfully present.[302] Federal authorities continued, however, to subject noncitizens attempting to enter the United States to lengthy detention, including those for whom removal was not reasonably

295 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

296 *Id.*

297 Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

298 *See id.* at 215.

299 Zadvydas v. Davis, 533 U.S. 678, 703 (2001) (Scalia, J., dissenting).

300 *Id.* at 703-04.

301 *See id.* at 706, 724 (Kennedy, J., dissenting).

302 *See* 8 C.F.R. § 241.13(b) (2016).

foreseeable. The primary example of this involved some of the Mariel Cubans, who, after being apprehended by the Coast Guard, had been paroled into the country pending formal admission decisions. Some went on to commit crimes, with the result that their parole was revoked and they were found inadmissible.[303] Challenges to the indefinite detention of these and similarly situated noncitizens eventually reached the Supreme Court in *Clark v. Martinez*.[304] This time Justice Scalia authored the majority decision, which held that the Court's construction in *Zadvydas* of the post-removal-order-detention provision must be applied consistently in all situations, including those involving noncitizens apprehended at entry.[305]

Thus, with respect to the detention of noncitizens who have been ordered deported or excluded but cannot be removed, the Court has construed the statute to impose a fixed outer limit on immigration detention. This construction followed from the long-held understanding that freedom from physical detention "lies at the heart of the liberty" interest protected by constitutional due process.[306]

In the 2003 decision *Demore v. Kim*,[307] however, the Court seemed to backtrack from this recognition in *Zadvydas*. In *Demore*, a 5–4 majority rejected a due process challenge to the INA's mandatory detention rule brought by an LPR detained during removal proceedings for six months without a bond hearing. The holding came as something of a surprise, because every circuit court of appeals to consider a challenge to the mandatory detention provisions after *Zadvydas* had found a due process violation.[308]

The case sharply divided the Justices.[309] Chief Justice Rehnquist wrote for the Court on the due process issue, but the critical fifth vote

303 *See* Laurie Joyce, *INS Detention Practices Post-*Zadvydas v. Davis, 79 INTERPRETER RELEASES 809 (2002).

304 543 U.S. 371, 378 (2005).

305 *See id.* at 378 ("As the Court in *Zadvydas* recognized, the statute can be construed 'literally' to authorize indefinite detention, or (as the Court ultimately held) it can be read to 'suggest [less than] unlimited discretion' to detain. It cannot, however, be interpreted to do both at the same time."); *see also Zadvydas*, 533 U.S. at 710-11 (Kennedy, J., dissenting) (criticizing the 6-month gloss given the post-removal detention statute by the majority in *Zadvydas* in part because the same provision also governs the detention of arriving aliens excluded at the border).

306 *Zadvydas*, 533 U.S. at 690; s*ee also* Traum, *supra* note 126, at 521-22.

307 Demore v. Kim, 538 U.S. 510 (2003).

308 *See* Anello, *supra* note 24, at 383 n.117 (citing pre-*Demore* decisions from the 3rd, 4th, 9th, and 10th Circuit Courts of Appeal finding mandatory detention to violate due process).

309 Justices Stevens, Souter, Ginsburg, and Breyer joined Part I, which held that the Court had jurisdiction to review challenges to the mandatory detention provision.

in support of his ruling on that aspect of the case was provided by Justice Kennedy, who also wrote a separate concurrence.

The Chief Justice distinguished *Zadvydas* in two important respects. First, *Zadvydas* concerned noncitizens "for whom removal was 'no longer practically attainable.'"[310] In that situation, continued detention no longer furthered the purpose underlying confinement. In contrast, detention during removal proceedings increases the possibility that noncitizens will be successfully removed if ordered deported.[311] Even more critical for the underlying due process analysis was the Court's assessment that detention during removal proceedings is of much shorter duration than the "potentially permanent" period rejected in *Zadvydas*.[312] In reaching this assessment, the Court noted government-provided data indicating that in most cases removal proceedings were completed within an average of 47 days, or, in the event of an appeal, four months.[313] More generally, Chief Justice Rehnquist reaffirmed the breadth of Congress's power over immigration rules and noted that detention has long been recognized as "a constitutionally valid aspect of the deportation process."[314] The Chief Justice also expounded on the dangers posed by "criminal aliens" and Congress's belief that the INS was unable to remove them without mandatory detention.[315]

Justice Kennedy's concurring opinion acknowledged the important due process concerns raised by detention and emphasized that the Court's ruling was predicated on the understandings that (1) noncitizens had the right to challenge the government's assertion that they fell into a mandatory detention category, and (2) detention during removal proceedings was generally of a brief duration.[316] Justice Kennedy went on to indicate his view that a noncitizen "could

Demore, 538 U.S. at 512, 516-17. Justices O'Connor, Scalia, and Thomas joined Part II, which found no due process violation. *Id.* at 512, 517-31. Justice Kennedy joined the Chief Justice's opinion in full, but also wrote a concurring opinion. *Id.* at 531 (Kennedy, J., concurring).

310 *Id.* at 527 (majority opinion).

311 *See id.* at 527-28.

312 *See id.* at 528-29.

313 *See id.* at 529 ("In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months with a median time that is slightly shorter.").

314 *Id.* at 521-23 (citing, inter alia, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) and Wong Wing v. United States, 163 U.S. 228, 235 (1896)).

315 *See id.* at 518-21 (describing the INS's "wholesale failure . . . to deal with increasing rates of criminal activity by aliens" and "near-total inability to remove deportable criminal aliens").

316 *See id.* at 531-33 (Kennedy, J., concurring).

be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified."[317] In a lengthy dissent, Justice Souter, joined by Justices Stevens and Ginsburg, offered a full-throated account of the liberty interests at stake, and excoriated the majority for ignoring decades of case law cutting the other way, including *Zadvydas*.[318] Justice Breyer dissented separately.[319]

A number of commentators have suggested that the differing outcomes (and tenors) of *Zadvydas* and *Demore* reflect the influence of the intervening September 11, 2001 terrorist attack and its security-focused political aftermath.[320] And in fact, over the long run, *Demore* has proven a weaker precedent for executive detention authority than critics originally feared. Lower federal courts have increasingly distinguished *Demore* as limited to a particular set of facts that no longer mark pre-removal detention. In particular, in rejecting the challenge to the mandatory detention statute both Chief Justice Rehnquist's majority opinion and Justice Kennedy's concurrence had emphasized the relatively short duration of removal proceedings.[321] In

317 *Id.* at 532; *see also id.* at 532-33 ("Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, but to incarcerate for other reasons.").

318 *See id.* at 543, 560-61 (Souter, J., dissenting) ("While there are differences between detention pending removal proceedings (this case) and detention after entry of a removal order (*Zadvydas*), the differences merely point up that Kim's is the stronger claim.").

319 *Id.* at 576 (Breyer, J., concurring in part and dissenting in part).

320 *See* Anello, *supra* note 24, at 376; Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 365 (David A. Martin & Peter H. Shuck eds., 2005); Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 UC DAVIS L. REV. 815, 834 (2005) ("One cannot read the language of liberty in *Zadvydas* and *Kim* without concluding that there was a shift in the Court in the two years after *Zadvydas* — the two years immediately after September 11."); *see also* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 UC DAVIS L. REV. 609 (2005); Martinez, *supra* note 279, at 1071-72 (observing that federal decisions "in the immediate aftermath of September [11] might be too quick to uphold [detention] programs that, in a more sober atmosphere several years down the road, might be found unlawful").

321 It has recently come to light that the Court's understanding in *Demore* of typical detention times was inaccurate, in reliance on erroneous representations by the Department of Justice in that litigation. *See* Letter from Ian Heath Gershengorn, Acting Solicitor Gen., U.S. Dep't of Justice, to Honorable Scott S. Harris, Clerk, U.S. Supreme Court (Aug. 26, 2016), http://online.wsj.com/public/resources/documents/Demore.pdf. *See infra* text accompanying notes 328-30.

contrast, immigration proceedings now average over 500 days in general, and over 400 days for detained respondents.[322] As a result, lower federal courts have increasingly applied the due process norms expounded in *Zadvydas* to situations involving mandatory detention during removal proceedings, requiring individualized bond hearings when detention becomes unreasonably long.

In *Lora v. Shanaham*, for example, the Second Circuit relied on Justice Kennedy's concurrence in *Demore* and the presumptive constitutional limit established by the majority in *Zadvydas* to hold that noncitizens detained during removal be afforded an individual bond hearing within six months.[323] The court held "there must be some procedural safeguard in place for immigrants detained for months without a hearing."[324] Every other circuit to squarely consider the issue has reached a similar conclusion, although courts have differed with respect to whether to impose the presumptive six-month limit.[325] Thus, the Court's rulings in *Zadvydas*, *Demore*, and *Clark* exerted a somewhat libertarian influence on lower courts adjudicating due process challenges to immigration detention. Together, the cases established reasonableness — sometimes defined as a presumptive six-month limit — as a benchmark for permissible detention before the

[322] *See* Rodriguez v. Robbins, 804 F.3d 1060, 1072 (9th Cir. 2015) (noting that persons facing detention during proceedings "spend, on average, 404 days in immigration detention"); *Immigration Court Processing Time by Outcome*, TRAC IMMIGR. (Sept. 2016), http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (showing average processing time for all removal cases to be 500 days or more in fiscal years 2012–2016, and to exceed 200 days each year since 1999).

[323] *See* Lora v. Shanahan, 804 F.3d 601, 613-615 (2d Cir. 2015).

[324] *Id.* at 614.

[325] *See, e.g.*, *Rodriguez*, 804 F.3d at 1068, 1090 (finding that "the Court's holding in *Demore* turned on the brevity of mandatory detention" and requiring that bond hearings be provided at six-month intervals); Diop v. ICE/Homeland Sec., 656 F.3d 221, 234-35 (3d Cir. 2011) (relying on Justice Kennedy's concurrence to hold that noncitizens detained during proceedings for an "unreasonable" amount of time must be afforded an individualized bond hearing and finding "no question that Diop's detention for three years . . . was . . . a violation of the Due Process Clause"); Tijani v. Willis, 430 F.3d 1241, 1249 (9th Cir. 2005) (relying on Justice Kennedy's concurrence to hold that noncitizen's 30-month detention during proceedings "reached the point of unreasonableness," requiring an individualized bond hearing); Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003) ("[C]ourts must examine the facts of each case, to determine whether there has been unreasonable delay in concluding removal proceedings."); Flores-Powell v. Chadbourne, 677 F. Supp. 2d 455, 472, 475 (D. Mass. 2010) (noting the constitutional limits on detention during the removal process articulated by Justice Kennedy and holding that a 22-month detention violated due process).

government must provide an individualized bond hearing or release the noncitizen.

Notably, this term the Court will once again weigh in on a challenge to immigration detention. In *Jennings v. Rodriguez*, the Court will have an opportunity to revisit *Demore*. In that litigation the Ninth Circuit upheld a federal injunction requiring DHS to provide bond hearings to noncitizens in removal proceedings when their detention reaches six months, with release if determined to not be a flight or public safety risk.[326] The injunction implicates several of the statutory mandatory detention categories, including noncitizens seeking admission to the United States and noncitizens with criminal convictions (the same category at issue in *Demore*).[327] In the fashion of *Zadvydas*, the Ninth Circuit's ruling was statutory, employing the interpretive canon of constitutional avoidance to read a right to periodic review of the government's justification for continued detention into the provisions.

There is some basis to suspect that the Court will uphold most or all of the Ninth Circuit's decision, or will find an alternative means of exerting due-process influenced limitations on the detention provisions. First, as already mentioned, the lower federal courts have resoundingly endeavored to distinguish *Demore* in light of the significantly increased length of detention since that decision was issued. What is more, it has recently come to light that the Department of Justice actually misled the Court in *Demore* regarding the duration of typical detention times.[328] In particular, rather than the four-months figure for detention where an appeal is taken that was provided to the Court, it turns out the average length of detention at that time was in fact 382 days, with a median of 272 days.[329] As discussed above, this government-generated data regarding the alleged brevity of detention during removal proceedings appeared to have persuaded Justice Kennedy to join the Court's holding and provide the critical concurrence in *Demore*. Thus, although the DOJ's erroneous representations may have been inadvertent, the recent retraction further undermines the rationale of that decision and its value as precedent.[330]

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[326] *See Rodriguez*, 804 F.3d at 1078-85.

[327] *See id.*

[328] *See* Letter to Honorable Scott S. Harris, Clerk, U.S. Supreme Court, from Ian Heath Gershengorn, Acting Solicitor General, U.S. Dep't of Justice, Re: Demore v. Kim, S. Ct. No. 01-1491 (Aug. 26, 2016), http://online.wsj.com/public/resources/documents/Demore.pdf.

[329] *See id.*

[330] On the problem of the Supreme Court's reliance on unverifiable assertions of

Furthermore, as I have shown in this article, *Demore* is something of an outlier in the Court's deportation jurisprudence over the last fifteen years, which across the board has aimed to increase noncitizen's opportunities to present legal and equitable defenses to removal. Allowing noncitizens who do not pose a flight risk or danger to secure release after six months (or at the point when detention becomes unreasonable, in light of guidelines the Court may issue in *Rodriguez*) will significantly further such goals. As the Ninth Circuit noted in its decision, "many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status."[331] For all these reasons, the Court may well approach *Rodriguez* with one eye on the case's equity-enhancing consequences and the other on the government hoodwink that helped produced the result in *Demore* in the first place.

It bears noting, however, that even if the outcome of *Rodriguez* is positive for noncitizens, neither it nor the Court's earlier detention cases concern the conditions or the frequency of immigration detention. A number of commentators have highlighted the significant hardships for noncitizens and their families that follow from immigration detention.[332] Noncitizens are overwhelmingly held in highly restrictive conditions that differ little from those endured by convicted felons; in fact, immigration detainees are often held alongside criminal inmates in prisons.[333] Solitary confinement,

fact by the Office of the Solicitor General, see Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600 (2013).

331 *Rodriguez*, 804 F.3d at 1072.

332 *See* Anello, *supra* note 24, at 367-70; Cade, *The Challenge of Seeing Justice Done*, *supra* note 31, at 37-39; Hernandez, *Invisible Spaces*, *supra* note 294, at 892-97; Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 46-47 (2010) [hereinafter *Rethinking Detention*]; Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility — A Case Study*, 78 FORDHAM L. REV. 541, 556 (2009); Mark L. Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 65-66 (2012); *see also* HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM — A TWO-YEAR REVIEW (2011); DORA SCHRIRO, DEP'T OF HOMELAND SEC., U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009).

333 *See, e.g.*, HUMAN RIGHTS FIRST, *supra* note 332, at i; SCHRIRO, *supra* note 332, at 4, 21; INTER-AM. COMM'N ON HUMAN RIGHTS, REPORT ON IMMIGRATION DETENTION IN THE UNITED STATES: DETENTION AND DUE PROCESS 85 (2010); Anello, *supra* note 24, at 367-68; Hernandez, *Invisible Spaces*, *supra* note 294, at 893.

restricted visitation, abuse, and inadequate medical care are increasingly well-documented.[334] A recent report on eleven immigrant-only contract detention sites found striking medical neglect, including "critical delays in care" for detainees with "cancer, AIDS, mental illness, and liver and heart disease," failures to properly diagnose patients with "obvious and painful symptoms," and widespread use of overworked, underqualified medical workers.[335] Furthermore, many detained noncitizens face substantial practical obstacles to challenging either their removal or their detention, including the lack of any right (or even access) to counsel, and disconnection from family and other support networks.[336]

Even so, the modern Court's detention cases reflect a break with longstanding precedent in establishing an outer limit on the time that the Executive can detain noncitizens without an individualized hearing regarding the appropriateness of continued confinement. The Court's recent jurisprudence thus has yielded (and may further strengthen, in this term's *Rodriguez* decision) an important safeguard against unreasonably long detentions as a consequence of immigration violations. These limits are significant in facilitating the ability of many noncitizens to raise (and win) equitable and legal defenses to removal.[337]

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[334] *See, e.g.*, PHYSICIANS FOR HUMAN RIGHTS, PUNISHMENT BEFORE JUSTICE: INDEFINITE DETENTION IN THE U.S. 17-18 (2011); Anello, *supra* note 24, at 368; Hernandez, *Invisible Spaces*, *supra* note 294, at 893-97; Kalhan, *Rethinking Detention*, *supra* note 332, at 42, 47; Nina Bernstein, *Officials Hid Truth of Migrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, at A1; Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 24, 2013, at A1; Lisa Graybill, *Immigration Detainees Fear Rape and Death*, ACLU BLOG (Oct. 25, 2011), https://www.aclu.org/blog/immigration-detainees-fear-rape-and-death; Seth Freed Wessler, *'This Man Will Almost Certainly Die,'* NATION (Jan. 28, 2016), https://www.thenation.com/article/privatized-immigrant-prison-deaths/.

[335] *See* Wessler, *supra* note 334 (reporting that of the 77 medical records concerning noncitizens who died in detention that contained enough information to allow a medical judgment, reviewing doctors found that adequate medical care had been provided only in 39 cases, and contending that detainees are "dying of treatable diseases — men who very likely would have survived had they been given access to adequate care").

[336] *See* Hernandez, *Invisible Spaces*, *supra* note 294, at 883, 889 ("Though *Zadvydas* represents an important glimmer of judicial oversight of immigration detention, its impact is rather meager given that detainees are not afforded appointed counsel and are frequently detained in remote locations that make securing counsel quite difficult.").

[337] *See, e.g.*, PETER L. MARKOWITZ ET AL., N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 19 (2011), http://www.cardozolawreview.com/content/denovo/NYIRS_

III. IMPLICATIONS AND LIMITATIONS

In recent years, the Court has devoted a significant portion of its shrinking docket to adjudicating disputes that bear on the possibility of normatively unjust deportations.[338] As this Article has demonstrated, the Court's deportation jurisprudence recognizes, and attempts to structure, the critical role that enforcement discretion plays in the modern deportation system. Across a diverse set of legal issues, the cases evince a deep concern with the sweep of the statute, especially with respect to minor offenses leading to removal, detention, or to the inability to access discretionary relief. Unpacking all of the implications and drawbacks of the Court's approach presents many considerations that I cannot fully address in this article. Here my primary aim has been to bring some coherence to the Court's deportation jurisprudence as a whole, which until now has been examined in piecemeal fashion. However, a few of the most salient implications and limitations are readily apparent, and a logical starting point involves holistically reviewing the practical effects of the Court's key rulings on the deportation process, as discussed in Part II.

First, *Arizona* consolidates immigration enforcement power in federal officials, insulating discretionary non-enforcement priorities and choices from uninvited interference by state or local police. *Arizona* leaves no doubt that federal immigration officials may decline to enforce the law in some situations, even when dealing with persons who, as a matter of formal code law, are removable. Eventually, the Court may decide whether immigration officials may implement equity-based non-enforcement decisions on a more generalized basis.[339]

Of course, a system that primarily depends on enforcement discretion to achieve justice channels far-reaching power and responsibility to a particular set of institutional actors — namely, agency policy-makers and their front-line enforcement officers and

Report.pdf (reporting study in which only 18% of detained noncitizens with counsel and 3% without counsel were successful in removal proceedings, in contrast to a win-rate of 74% for non-detained (or released) noncitizens with counsel and 13% without counsel); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015) (analyzing 1.2 million deportation cases to demonstrate that only 14% of detained immigrants were able to secure representation and that immigrants with attorneys were five-and-a-half times more likely to obtain relief from removal).

338 On the contraction of the Court's docket, see Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

339 *See infra* Part III.B.

prosecutors. Immigration-enforcers, however, may not always be best suited to determine with accuracy which cases warrant the exercise of equitable discretion.[340] Worse yet, consolidating power in the executive could result in a constriction of equitable decisionmaking. The risks that executive officials might fall short in injecting justice into the immigration system thus may have played a key part in the modern Court's many process-centered decisions, the overarching thrust of which aim to protect noncitizens' liberty interests.

To recap, *Padilla* ensures that a noncitizen who faces criminal charges will be aware of the immigration consequences that attach to various dispositions of the case, and encourages equity-based bargaining to avoid normatively unjustified deportations. The categorical approach and anti-retroactivity procedural cases work in conjunction with *Padilla* to facilitate strategic plea-bargaining and to keep open post-conviction possibilities for equitable relief. *Judulang* also suggests a restraint on immigration charging decisions that would arbitrarily preclude the possibility of equitable relief, and, more broadly, emphasizes the need to link enforcement actions to a normative evaluation of a noncitizen's fitness to remain in the United States. The second-look cases safeguard the ability of noncitizens to reopen removal cases, particularly when there is new evidence bearing on a defense to deportation or when the removal order stems from deficient attorney conduct. Finally, the detention cases impose outer limits on government authority to confine noncitizens — limits that depart sharply from more deferential principles previously embraced by a majority of the Court.[341]

Viewed holistically, the cases suggest that the modern Court believes that factors such as a noncitizen's presence in, connections with, and contributions to the United States, along with other mitigating factors (such as youth or the passage of time), should be balanced against the gravity of the immigration or criminal violation in order to evaluate whether deportation is warranted in individual cases. Thus, across the board, the Court's recent deportation jurisprudence appears to be guided by some kind of a proportionality principle, even though it has never directly articulated that principle, and may never do so. Some of the decisions directly concern the ratio between the underlying offense and the gravity of the sanction, while

[340] *See, e.g.*, Cade, *The Challenge of Seeing Justice Done*, *supra* note 31, at 46-54 (explaining why front-line immigration agents have difficulty consistently exercising equitable discretion).

[341] *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 227-28 (1953).

others aim to facilitate equitable claims, many of which are statute-based. The remainder of this Part elaborates on a few of the implications and drawbacks of the Court's approach to the implementation of equity concerns in the deportation system.

A. Crime and Status

As both a legal and practical matter, modern immigration enforcement against noncitizens is closely tied to criminal history. Many commentators have discussed the executive branch's enthusiastic implementation of the criminal detention and removal provisions enacted by Congress in the 1990s.[342] In Ingrid Eagly's words, "federal immigration enforcement has become a criminal removal system."[343] Indeed, the theme of executive decisionmaking in this area has been that criminal history, no matter how minor, is treated as an almost irrefutable signifier of undesirability.

The present-day Court, however, has taken a different tack. Since the 2001 ruling in *St. Cyr*, the Court has repeatedly scrutinized the immigration system's tight linkage of criminal behavior and deportation. The Court's decisions demonstrate that it believes consideration of the normative justifiability of deportation to be appropriate even where the noncitizen has a criminal history. Its categorical approach and related criminal deportation rulings, for example, dilute the otherwise little-restrained power of immigration officials to remove noncitizens on the basis of minor criminal convictions. These decisions indicate that the Court takes seriously the principle that severe penalties imposed on the basis of criminal convictions should be predicated on a more individualized consideration of equities.[344] On the other hand, this does not mean that the Court's proportionality concerns only inure to the benefit of noncitizens with criminal history. In *Torres*, for example, a majority of

[342] *See, e.g.*, Das, *supra* note 132, at 1725 ("[E]nforcement of all of these criminal grounds is rapidly expanding. The temptation for immigration officials to continue to erode categorical analysis in order to give more life to various removal provisions is great."); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651-52 (2004) ("[W]e live in a time of extreme 'vigor, efficiency, and strictness' as to deportation of non-citizens convicted of crimes, due to nearly two decades of sustained attention to this issue." (footnote omitted)); Koh, *supra* note 131, at 307.

[343] Eagly, *Criminal Justice for Noncitizens*, *supra* note 80, at 1128.

[344] *Cf.* Bowers, *Baselines*, *supra* note 17, at 1089 (arguing that the Court's recent criminal plea-bargaining cases "may even have subtly laid the foundation for a weak version of what I consider to be the proper baseline — *a normative baseline grounded in an entitlement to proportional punishment*" (emphasis in original)).

Justices was willing to depart slightly from the Court's general insistence on a strict categorical approach to analyzing immigration consequences of criminal convictions, in order to avoid a statutory interpretation that it perceived would allow very serious offenders to more easily avoid deportation.[345] The Court's primary concern appears to be with the extreme harshness of the statutory provisions enacted in the 1990s, and in particular with the possibility of balancing in cases involving persons with relatively minor convictions.

Additionally, a handful of the Court's decisions address the weak procedural protections afforded to noncitizens in immigration proceedings, supplementing its efforts to ensure that disproportionate consequences do not accompany minor convictions. In these ways, the Court has emerged as the sole federal branch willing to protect deportable noncitizens with criminal history.

The Court's deportation holdings also benefit noncitizens present in the United States without authorization or any formal path to lawful status. *Arizona* provides the most direct example, since Justice Kennedy's majority opinion explicitly acknowledged that the ruling will allow federal immigration officials to forgo removal proceedings against undocumented noncitizens.[346] Eleven million undocumented persons live in the United States, and the vast majority of those individuals have been here for over a decade.[347] As the Court recognized in *Arizona*, many of these persons will have formed families and other community bonds that make deportation "inappropriate."[348]

Padilla's Sixth Amendment rule likewise works to the benefit of undocumented noncitizens. It is well-accepted that the Constitution's criminal trial procedural protections are not contingent upon immigration status.[349] Severe immigration penalties such as detention,

[345] *See supra* text accompanying notes 204–11; *see also* Nijhawan v. Holder, 557 U.S. 29, 40 (2009).

[346] *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.").

[347] *See* Jeffrey S. Passel & D'vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (July 22, 2015), http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/.

[348] *See* Arizona v. United States, 132 S. Ct. at 2499; *see also* Plyler v. Doe, 457 U.S. 202, 202 (1982) (striking down as unconstitutional a Texas statute denying public education to undocumented children).

[349] *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 235 (1896); Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 HARV. LATINO L. REV. 1, 30 (2016). *But see* César Cuauhtémoc García Hernández, Padilla v. Kentucky*'s*

ineligibility for discretionary relief, truncated removal procedures, and lengthy or permanent bars on lawful return, automatically attach to convictions whether or not a defendant is already deportable for unlawful entry or unlawful presence.[350] Therefore, to provide constitutionally adequate assistance, defense attorneys must advise their undocumented clients about such consequences. Moreover, *Padilla*'s equitable function of promoting plea-negotiation strategies that take deportation into account will carry over to cases involving unlawfully present noncitizens.[351]

The results of the categorical approach similarly do not turn on the immigration status of the noncitizen. Categorical analysis works to keep certain convictions from being deemed particular removal offense categories, for example the aggravated felony categories. Aggravated felonies disqualify undocumented noncitizens from cancellation of removal or asylum.[352] Aggravated felonies can also result in expedited "administrative removal" proceedings for undocumented noncitizens, with even fewer procedural rights than are provided by regular immigration courts.[353] Finally, and most importantly, aggravated felonies result in a permanent bar to lawful return. Thus, by limiting the convictions that can be deemed aggravated felonies, the application of the categorical approach clearly can benefit the undocumented even if they remain deportable solely on the basis of unlawful status. In like fashion, the second-look and detention cases impact noncitizens facing removal who lack lawful immigration status.[354]

Inapplicability to Undocumented and Non-Immigrant Visitors, 39 RUTGERS L. REC. 47, 48 (2012) (arguing that *Padilla*'s Sixth Amendment rule does not apply to criminal defendants who are not LPRs).

350 *See* Cade, *Plea Bargain Crisis*, *supra* note 31, at 1809-10; Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC IRVINE L. REV. 415, 445 (2012).

351 *See* text accompanying *supra* notes 132–39, and *infra* note 349.

352 *See* Immigration and Nationalization Act (INA), 8 U.S.C. § 1158(b)(2)(B)(i) (2012) (aggravated felony is "particularly serious crime" precluding asylum); *id.* § 1229b(b)(1)(C) (aggravated felony precludes cancellation of removal for non-LPRs). Convictions classified as crimes involving moral turpitude can also preclude non-LPR cancellation of removal in some circumstances. *See* Cortez, 25 I.&N. Dec. 301, 311 (B.I.A. 2010) (holding that a conviction for a crime involving moral turpitude bars undocumented noncitizens from seeking cancellation of removal if the offense carries a potential sentence of one year or more).

353 *See* 8 U.S.C. § 1228(b)(1)–(2); Cade, *Enforcing Immigration Equity*, *supra* note 18, at 673; Wadhia, *supra* note 231, at 2-3.

354 *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 378 (2005) (holding that a statutory provision cannot be given different meaning depending on the immigration status of

We should not miss the significance of this expansive conception of which persons have some claim to continued presence that the Court believes is appropriately evaluated prior to the imposition of banishment. In a seminal article on the modern convergence of criminal law and immigration enforcement, Juliet Stumpf observed that "at bottom, both criminal law and immigration law embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community."[355] While criminal law strips elements of membership from serious offenders, immigration law acts as a fence around membership, admitting only those noncitizens who can clearly establish their right to pass through the gate.[356] Many millions of undocumented noncitizens in the United States lack any path to lawful status, perpetually fenced out from full inclusion. But the Court's conception of potential claims to membership, or at least some of its aspects, is broader and more inclusive than formal code law, which presumes non-membership.[357] In this sense, the Court's understanding of immigration law and membership appears to overlap with a theory of inclusion that Hiroshi Motomura has described as "immigration as affiliation."[358] Under this view, immigration law should acknowledge and account for immigrants' family ties and community contributions in this country.[359] Because current code law provides insufficient mechanisms for adjudicative consideration of

the person being detained).

[355] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 397 (2006).

[356] *Id.* at 399-400; *see* Linda S. Bosniak, *Membership, Equality, & the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1055 (1994); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 157-58 (1999).

[357] The Court's conception of undocumented children as deserving at least some of the protections afforded by U.S. society membership, despite their deportability, was also present in Plyler v. Doe, 457 U.S. 202 (1982).

[358] MOTOMURA, *supra* note 11, at 110-11.

[359] This way of understanding the Court's recent immigration jurisprudence also helps explain why it is less solicitous with respect to due process challenges to visa admission denials, which typically involve noncitizens yet to build significant equities in the United States. *See, e.g.*, Kerry v. Din, 576 U.S. 135 (2015); *see also* Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2007) (articulating "ethical territoriality," the idea that physical presence within the United States gives rise to rights and recognition); Geoffrey Hereen, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013) (discussing the distinction between insiders and outsiders with respect to rights); Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49 (2013) (same).

affiliation circumstances, the Court has endorsed the weighing of such factors through upstream discretionary enforcement decisions and criminal court negotiations. It has also reinforced anti-retroactivity norms and tools such as the categorical approach, which soften some of the harshest aspects of the criminal removal provisions.

To be sure, with respect to unauthorized noncitizens the Court's solicitude in this regard extends no further than endorsement of discretionary permission to remain where the equities are strong enough; the immigration cases do not create new paths to status or citizenship. Nevertheless, the freedom to stay inside the United States, still unified with family and community, is arguably the most fundamental aspect of membership, even if it falls far short of conferring the status necessary for equal membership. Furthermore, deportable noncitizens who manage to remain within the United States as a result of individual or macro enforcement choices are much more likely to benefit from future developments in law or policy than those who already have been deported.[360]

Seen in this light, the Court's recent immigration jurisprudence resonates with the representation-reinforcing theory championed by John Hart Ely.[361] As Professor Ely argued, the judiciary has a special responsibility to protect marginalized and politically voiceless groups.[362] In *St. Cyr*, the Court explicitly referenced the "political pressures" that may lead the legislature to target "unpopular groups or individuals."[363] The Court noted that noncitizens, lacking the right to vote, "are particularly vulnerable to adverse legislation."[364] The proportionality principle at work in *St. Cyr* and other discretion-preserving deportation cases can thus been seen as implementing "resilient strains of constitutional theory most famously expressed in 'footnote four' of *United States v. Carolene Products Co.*"[365] The political branches, the Court seems to believe, have paid insufficient attention

[360] *See* MOTOMURA, *supra* note 11, at 86 ("The idea of Americans in waiting is an expectation, held by both a newcomer and those already here, that the newcomer will belong someday.").

[361] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181-83 (1980).

[362] *See id.*

[363] *See* INS v. St. Cyr, 533 U.S. 289, 315 (2001) (quoting and citing Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994)).

[364] *St. Cyr*, 533 U.S. at 316 n.39 (quoting and citing Stephen Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615 (2000)).

[365] *See* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1293 (2002).

to the equitable claims of noncitizens who have convictions, or who lack resident status, before imposing life-altering immigration sanctions. The Court's recent deportation jurisprudence appears calibrated, within the judiciary's institutional constraints, to address that failure.

B. Categorical (Non-)Enforcement Discretion?

This understanding of the Court's growing solicitude for the equitable rights of unauthorized noncitizens also has implications for larger-scale discretionary policies designed to limit the removal of noncitizens with particularly sympathetic equities, such as those at issue in *United States v. Texas*.[366] While unique features of the Obama administration's efforts to extend deferred action to certain childhood arrivals and parents of U.S. citizens or Lawful Permanent Residents complicate evaluation of their legality, the wide scholarly consensus was that they comprised permissible exercises of enforcement discretion.[367] For present purposes, we may sidestep a full engagement

[366] Announced late in 2014, the deferred action programs were soon halted by a federal lawsuit brought by 26 states or state officials. *See* David Montgomery & Julia Preston, *17 States Suing on Immigration*, N.Y. TIMES (Dec. 3, 2014); Alicia Parlapiano, *What Is President Obama's Immigration Plan?*, N.Y. TIMES (Nov. 20, 2014). The district court preliminarily enjoined the rollout of the programs on the grounds that they amounted to a formal rule that should have been promulgated through notice and comment procedures. *See* Texas v. United States, No. B-14-254, 604, 677 2015 WL 648579 (S.D. Tex. Feb. 16, 2015). A divided Fifth Circuit panel then upheld the preliminary injunction, focusing on the categorical nature of the programs, the size of the pool of persons who might benefit, and the affirmative benefits that flow from the status of deferred action, in particular employment authorization. *See* Texas v. United States, 787 F.3d 733, 778, 794 (5th Cir. 2015). Pursuant to the laws or policies of some states, deferred action and/or federal employment authorization enables access to state drivers' licenses, which is what the states asserted as their primary injury in the lawsuit. *Id.* When the government's appeal reached the Court, the Court issued a one-sentence per curiam decision, which indicated that its eight members were equally divided, thereby affirming the lower court's judgment (although without further precedential effect). *See* United States v. Texas, 136 S. Ct. 2271 (2016). Subsequently, the Court rejected the administration's motion for rehearing once a ninth Justice is confirmed, returning the matter to proceed in the District Court. *See* Petition for Rehearing, United States v. Texas, 136 S. Ct. 2271 (July 18, 2016) (No. 15-674), 2016 WL 3902439, *reh'g denied*, (Oct. 3, 2016), https://www.supremecourt.gov/orders/courtorders/100316zor_9ol1.pdf.

[367] For a sample of recent scholarship arguing that the deferred action programs were constitutional, see MOTOMURA, *supra* note 11, at 147; Cox & Rodriguez, *Redux*, *supra* note 29, at 104; Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 256 (2013); Kalhan, *Deferred Action*, *supra* note 83, at 85; Shoba S. Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority – Response to Hiroshi*

with the constitutionality of DAPA and DACA in particular, instead focusing on the extent to which such efforts generally align with the Court's recent deportation jurisprudence.

Bracketing the question of their ultimate legality, it seems abundantly clear that the deferred action programs were an instance of equity-driven enforcement discretion, aimed at implementing some of the Department of Homeland Security's proportionality concerns in the face of code stringency.[368] In particular, the criteria for DACA — long-term residence in the United States, entering the country at a very young age, earning a high school diploma, lacking a criminal record and other "red-flag" markers of antisocial behavior — illustrates some of the inflexibility and harshness of the current code, which provides few formal mechanisms for such persons to one day regularize their immigration status.[369] For those who qualified for DACA, entry or presence in the United States without authorization was the offense triggering the sanction of deportation and a ten-year bar on lawful return.[370] Even so, the mitigating factors built in to the program's criteria suggested at least significantly diminished personal culpability, strong community ties, assimilation as Americans, high potential for economic productivity, and no indications of criminality or dangerousness. The criteria for DAPA, which would have benefited the law-abiding, long-present parents of U.S. citizens or LPRs, also reflected the Obama administration's concern with unjustly imposing

Motomura, 55 WASHBURN L.J. 189, 192 (2015); Letter from 136 Law Professors and Scholars to President (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf. For opposing scholarly views, see Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 785-77 (2013); Peter Margulies, *Take Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 106 (2014); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 680 (2014); Rubenstein, *Immigration Structuralism*, *supra* note 69, at 84.

368 *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 685-86, 694-98.

369 *See Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca (last updated Aug. 10, 2016).

370 *See* Immigration and Naturalization Act (INA) 8 U.S.C. § 1227(a)(1)(A)–(C) (2012) (providing that noncitizens who were inadmissible at the time of entry, or who are present in violation of the INA, or who fail to maintain or comply with the conditions of non-immigrant status, are deportable); *id.* § 1182(a)(9)(B)(i)(II) (setting forth a ten-year bar on reentry of noncitizens who are removed or who depart the United States after having resided without authorization for at least one year).

the life-altering penalty of deportation in light of certain noncitizens' underlying conduct and personal circumstances.[371]

These kinds of deferred action programs would exempt (at least temporarily) from enforcement deportable noncitizens who can point to highly sympathetic equities, focusing in particular on situations that implicate the well-being and diminished culpability of children. To be sure, the scale of those who might have benefited from DACA and DAPA combined — estimated at a combined five million, or nearly half the entire undocumented population — was fairly breathtaking.[372] In the view of some commentators, the categorical nature of the programs was at odds with traditional notions of individualized equity.[373] Others countered that the deferred action programs' design merely "relocate[d] discretion to a point higher up in the bureaucracy,"[374] that low-level agents retained adequate discretionary power in evaluating DACA applicants,[375] and that in any event the large number of potential beneficiaries simply reflected the fact that a large number of removable noncitizens in the United States have extremely sympathetic equities.[376] Ultimately, the take-away for present purposes is that these efforts were driven by the Obama administration's perceived need to exercise consistent discretion in immigration enforcement, rooted in equitable concerns about the proportionality of deportation.

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[371] *See* JEH CHARLES JOHNSON, SEC'Y U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN AND WITH RESPECT TO CERTAIN INDIVIDUALS WHO ARE THE PARENTS OF U.S. CITIZENS OR PERMANENT RESIDENTS (2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. The administration justified DAPA in part because American-born children will eventually be able to lawfully petition for their parents; therefore, offering prosecutorial discretion to the law-abiding persons within that group would avoid unnecessary destruction of the family unit. *See* Brief for the Petitioners, United States v. Texas, 136 S. Ct. 2271 (Mar. 1, 2016) (No. 15-674), 2016 WL 836758, at *62.

[372] *See* CAPPS ET AL., *supra* note 3, at 3-4.

[373] *See, e.g.*, Margulies, *supra* note 367, at 177; Michael W. McConnell, Opinion, *Why Obama's Immigration Order Was Blocked*, WALL STREET J., Feb. 18, 2015, at A15; Zachary Price, *Two Cheers for OLC's Opinion*, BALKANIZATION (Nov. 25, 2014), https://balkin.blogspot.com/2014/11/two-cheers-for-olcs-opinion.html.

[374] *See* Cox & Rodriguez, *Redux*, *supra* note 29, at 182; Kalhan, *Deferred Action*, *supra* note 83, at 90; *see also* MOTOMURA, *supra* note 11, at 205; Amanda Frost, *When Two Wrongs Make a Right: Response to Hiroshi Motomura*, 55 WASHBURN L.J. 101 (2015).

[375] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 695-96.

[376] *See id.* at 696-98; Kalhan, *Deferred Action*, *supra* note 83, at 70, 92; *see also* MOTOMURA, *supra* note 11, at 176.

In light of President-elect Donald Trump's signaled end to the Obama administration's deferred action initiatives, it is unlikely that *Texas* or associated litigation[377] will return to the Court. Thus, the scope of the President's authority to implement such equitable administrative efforts will remain uncertain for the time being. Arguably, however, such efforts are consistent with *Arizona*, where the Court acknowledged that federal enforcers may appropriately decline to enforce code law against deportable noncitizens, including as a result of general enforcement priorities. The Court did not predicate its preemption rulings on the necessity that enforcement discretion actually be exercised in any particular individual's case. Indeed, the vast majority of those protected from state action by *Arizona* will have avoided federal enforcement as the result of macro-level enforcement policies and resource decisions, rather than due to any form of case-by-case equitable balancing. Indeed, Justice Scalia's dissent in *Arizona* explicitly recognized the connection between the majority's endorsement of broad executive authority to under-enforce immigration law and the Obama administration's then-recent announcement of DACA.[378]

Further, the large body of deportation jurisprudence considered in this Article reflects the Court's significant pushback, within its institutional constraints, against the most unfair applications of a deportation system lacking back-end proportionality review. The intended beneficiaries of DACA and DAPA would seem to have fit that bill.[379]

C. Surrogates and Signals

While proportionality concerns appear to underlie the modern Court's deportation decisions, thus far the Court has been unwilling to

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[377] DACA-eligible noncitizens challenging the nationwide scope of the preliminary injunction in the Texas case have filed complaints in other jurisdictions. *See, e.g.*, Complaint, Lopez v. Richardson, No. 1:16-cv-09670 (N.D. Ill. Oct. 12, 2016); Complaint, Vidal v. Baron, No. 1:16-cv-04756 (E.D.N.Y. Aug. 25, 2016) 2016 WL 4524062.

[378] *See* Arizona v. United States, 132 S. Ct. at 2521 (Scalia, J., dissenting) (criticizing the majority for insulating from state interference the federal government's failure "to enforce the immigration laws as written" and connecting DACA with the Court's elevation of enforcement discretion to the status of law for purposes of preemption analysis).

[379] *See* Cade, *Enforcing Immigration Equity*, *supra* note 18, at 698 ("Noncitizens who meet the criteria for these programs — law-abiding and productive childhood arrivals or parents of U.S. citizens or LPRs — are likely to be among the portion of the deportable population presenting the greatest normative challenge to the operation of the removal system.").

invalidate substantive immigration laws or overturn individual outcomes on proportionality grounds. The categorical approach cases do mitigate the harshness of the aggravated felony provisions by rejecting broad interpretations of the criminal removal grounds.[380] In this way, as a practical matter many of the cases do have a substantive, proportionality-enhancing effect.[381] But for the most part the Court's decisions rely on procedural and structural tools to inject the *possibility* of equitable balancing into the criminal justice and immigration enforcement systems.[382] These procedural safeguards thus function as surrogates for, or enablers of, fairness and proportionality, rather than providing specific guidance about what might make any particular deportation unjust.[383]

One possible consequence of the Court's non-substantive approach in this regard is that the deportation system in the future could become even harsher and more inflexible.[384] The rulings only tend to create conditions that make the exercise of equitable balancing more likely.[385] Judicial review is limited to assessing whether procedural requirements were adhered to; the Court does not directly evaluate the substantive outcomes generated by equitable balancing.[386] As a result, Congress could amend the INA to squelch equitable relief more

[380] *See* Traum, *supra* note 126, at 525 ("In *Leocal*, the Court's 'ordinary' and 'natural' reading of the statute was not merely procedural, as it yielded a substantive result: it limited the scope of the aggravated felony definition and meant that a class of noncitizens would not be subject to permanent exile.").

[381] *See id.* at 530 ("As a result of *Lopez* and *Carachuri-Rosendo*, many low-level drug offenses do not qualify as aggravated felonies.").

[382] Of course, process is critical. *See, e.g.*, Shaugnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting) ("Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."); Martinez, *supra* note 279, at 1026-27 (discussing social science work showing that perceptions of fairness depend on process as well as substantive outcomes). However, well-designed procedure may also distract from failure to provide substantively fair outcomes. *See generally id.*

[383] *Cf.* Koh, *supra* note 131, at 300 (arguing that the categorical approach "operates as a proxy for the availability of relief from deportation and corrects for the lack of proportionality in the laws").

[384] *See, e.g.*, Johnson, *Immigration in the Supreme Court*, *supra* note 67, at 77 ("Congress, of course, could intervene to foreclose judicial review of motions to reopen, but has not yet done so.").

[385] *Cf.* Bowers, *Baselines*, *supra* note 17, at 1112-13 (discussing a similar phenomenon in the Court's approach to criminal law plea-bargaining).

[386] *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 314 n.38 (2001) ("Moreover, this case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not, as the dissent suggests, an objection to the manner in which discretion was exercised.").

emphatically (for example, by making *any* criminal conviction an automatic basis for deportation), and the executive could throw discretionary enforcement leniency decisions to the wind.[387]

The Court may have substantial reasons for declining to recognize a substantive proportionality right in this context. For example, the Court might wish to afford the political branches leeway to facilitate rapid deportation in particularly sensitive cases or in particularly exigent circumstances. The Court also may wish to avoid the flood of proportionality-based challenges to removal that would undoubtedly follow recognition of anything approaching a substantive right. And in any event, the Court's approach to proportionality concerns in other areas of the law — most notably criminal law — is similarly heavy on process and light on substance.[388]

Perhaps, then, the Court's decisions in this area are best viewed as signals to the political branches that specific aspects of the system are in need of reform.[389] In particular, the Court seems to be messaging, and with some urgency, that more room for individualized evaluation is critical for adequate protection of noncitizens' interests when facing deportation. While the judiciary is not institutionally situated to create a humane deportation system, the Court can fire shots intended to jolt the political branches into the process of statutory or regulatory reform, if only piecemeal.[390] After all, executive officials and

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[387] Even in that scenario, the Court might at least continue to police overtly discriminatory or arbitrary and capricious executive enforcement practices. *See* Arizona v. United States, 132 S. Ct. 2492, 2510 (2012) (observing that plaintiffs could bring an as-applied discriminatory challenge to the operation of SB 1070 in the future); Judulang v. Holder, 132 S. Ct. 476, 481-82 (2011); Reno v. AADC, 525 U.S. 471, 510-11 (1999); Heckler v. Chaney, 470 U.S. 821, 1657-58 (1985). But the Court's reliance on procedural rather than substantive holdings puts it "in an institutionally weaker position to later strike down Congress's fix on rights-based grounds." Martinez, *supra* note 279, at 1030; *see also id.* at 1031 (arguing that procedural rulings can have negative impact on substantive rights because they allow rights violations to continue and foreclose rights-based challenges in the future without the merits ever being considered).

[388] *Cf.* Bowers, *Baselines*, *supra* note 17 ("The Court has exercised a kind of quality control over the procedural mechanisms of 'the machinery of criminal justice.' But it consistently has refused to exercise quality control over the substantive penalties that plea bargains produce.").

[389] *Cf.* Martinez, *supra* note 279, at 1029 ("The Court's [enemy combatant] decisions are less like landmarks and more like small signposts directing the traveller to continue toward an eventual, more significant fork in the road.").

[390] *See* Coenen, *supra* note 365, at 1366 (discussing inter-branch constitutional dialogue); *see also* Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives* 63, 71-73, *in* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Gillman & Clayton eds., 1999)

legislatures have duties to act constitutionally (and, arguably, proportionally), regardless of the judiciary's willingness or ability to fully enforce these obligations.[391]

Ideally, the Court's deportation jurisprudence would stimulate Congress to amend the underlying rules, rolling back the breadth and severity of the removal grounds and detention, and rules returning broader adjudicative discretionary authority to immigration judges. These developments would decrease pressure on the executive to seek proportionality through unusual (and more controversial) measures, such as President Obama's deferred action programs. As a result of political gridlock in this area, however, Congress has not been able to enact meaningful immigration reform for many years, despite many attempts.[392]

If Congress is unwilling or unable to enact statutory amendments along these lines, the Court's deportation cases suggest that executive officials must work harder to inject proportionality into the system through enforcement discretion and policy choices. In particular, the Court has tried to impart the message that immigration officials are taking too stringent a line with respect to noncitizens with criminal history, by pushing for over-expansive interpretations of the removal provisions and treating almost any conviction as an unchangeable mark of undesirability.[393] Thus far, however, even direct rebukes from the Court have not stemmed the tide of cases challenging the executive's aggressive approach to deporting longtime lawful permanent noncitizens with minor convictions.[394]

(describing how the Court's decisions can act as a catalyst for political action).

391 *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES 84-92 (2004); Cade, *Policing the Immigration Police*, *supra* note 31, at 189-96; Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 UC DAVIS L. REV. 1591, 1591-92 (2014); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1225 (2006); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128–30 (1993).

392 *See* MARC R. ROSENBLUM, MIGRATION POLICY INST., U.S. IMMIGRATION POLICY SINCE 9/11: UNDERSTANDING THE STALEMATE OVER COMPREHENSIVE IMMIGRATION REFORM 1 (2011); Ryan Lizza, *Getting to Maybe: Inside the Gang of Eight's Immigration Deal*, NEW YORKER (June 24, 2013).

393 *See supra* Part II.B.2; *see also* Transcript of Oral Argument at 29, Torres v. Lynch, 136 S. Ct. 1619 (2016) (No. 14-1096) (Scalia, J.: "I don't understand. Your argument is we have to interpret this thing to be as expansive as possible?"); Cade, *Enforcing Immigration Equity*, *supra* note 18, at 700-02; Traum, *supra* note 126, at 528 (arguing that the categorical approach cases "seem[] to caution against expansive interpretations").

394 *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 (2013) (noting that for "the third time in seven years" the Court has rejected immigration officials'

CONCLUSION

The decline of equity-based decision-making in regard to deportation has shaped the Court's recent jurisprudence in this field. After a century of extreme deference to the political branches, the Court has increasingly scrutinized the modern deportation regime's lack of equitable individuation, especially regarding noncitizens with criminal history. The cases appear to represent a comprehensive, institutional response to an underlying sea change in the statutory and enforcement background.

But the Court's procedural approach to regulating proportionality in the operation of the deportation system has many drawbacks. Because the Court has not recognized a substantive proportionality principle in this area, immigration law may continue to address equitable considerations in only an indirect and incomplete way through unusual (and often controversial) executive efforts and episodic ameliorative rulings handed down by the Court. If the Court intends the deportation cases to signal the political branches that specific reform is needed, thus far the message has not been received, or at least not acted upon. In the absence of significant legislative or executive changes in this area, we can expect the Court to continue to keep a steady diet of deportation cases on its docket, chipping away at the harshest edges of a system marked by insufficient consideration of justice and humanity.

characterization of "a low-level drug offense as 'illicit trafficking in a controlled substance'").